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# THE INSURANCE LAW JOURNAL.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME COURT,  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### ACTION.

§ 1. FIRE. — *Defective Proofs cannot be Alleged after Commencement of.*—*Delay through Arbitration a Waiver of Limitation.*—  
It was too late after commencement of action to allege for the first time a defect in the proofs of loss regarding the notary.

O'Neil vs. Buffalo Ins. Co., 8 N. Y., 122; Mayor vs. Hamilton Fire Ins. Co., 39 N. Y., 45; Hay vs. Star Fire Ins. Co., 77 N. Y., 235. Nor does it apply except where the proofs of loss were originally complete and received without objection; Ames vs. N. Y. Union Ins. Co. 14 N. Y., 254; nor where the delay is occasioned by the demand of underwriters for other particulars. Mayor vs. Hamilton Fire Ins. Co., supra; Ames vs. Union Fire Ins. Co., supra; Hay vs. Star Fire Ins. Co., supra.

*Held*, That where after service of summons the company de-

layed the action by propositions to arbitrate, it cannot claim that suit was too late by reason of such delay.

*Steen vs. Niagara Ins. Co.*, 89 N. Y., 315.

*Barnum vs. Merchants' Fire Ins. Co.*

Rep'd Jour'l, p. 50.

N. Y. C. A.

§ 2. LIFE.—*Who may be Parties to.*—Before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe. It was well settled that persons against whom the defendant would have a right of action in case judgment go against him, may be made defendants on his application.

*N. Y. Life Ins. Co. vs. Rohrbough, Moore, & Co.*

Rep'd Jour'l, p. 60.

TEXAS C. A.

#### AGENT.

§ 3. LIFE.—*Authority to Bind Principal.*—When an agent having authority makes a contract in behalf of his principal, it is binding upon the principal although the principal has received no benefits from it. It is a well-settled rule of law that the principal is bound by the act of his agent, done within the scope of his apparent authority, in dealing with innocent third persons, although such act may be in direct violation of private instructions. For most practical purposes, a party dealing with an agent, who is acting within the apparent scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is the contract of the principal. It is a well-settled rule of law that, if a principal puts it in the power of his agent to make contracts, or to do acts, apparently within his authority, which will result in injury to innocent third persons, or to the principal, the law imposes the loss upon the latter.

*Merriman vs. Fulton*, 29 Texas, 97.

*N. Y. Life Ins. Co. vs. Rohrbough, Moore & Co.*

## AGENT.

§ 4. LIFE.—*Contract with Construed. — Not Entitled to Commissions in Case of Termination of Agency.*—The contract between a life company and its agent stipulated for a commission of twenty-five per cent on all first premiums and five per cent for renewals. No time was fixed during which the contract was to run. The company assigned its business to another company, and renewals on two of the policies procured by the agent were effected through an agent of the assignee. *Held*, That the contract was terminable at the election of either party and the agent was not entitled to renewal commissions except they were effected through him, there was no implied contract that he should be entitled to renewal commissions on policies which he had procured.

Hunt vs. Rausmonier, 8 Wheat, 174.

North Carolina State Life vs. Williams.

Rep'd Jour'l p. 60.

N. O. R. O.

## APPLICATION.

§ 5. LIFE.—*Truth of Answer in.—What Constitutes a Disease.*—To the question in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No: *Held*, That the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or incidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury, or inconvenience, or prolonged suffering.

Conn. Mut. Life Ins. Co. vs. Union Trust Co.

Rep'd Jour'l, p. 33.

U. S. S. C.

## ASSIGNMENT.

§ 6. FIRE.—*Waiver of Policy Provision by Agent.*—Although the policy of insurance contains a provision that it shall not be

assigned except by writing indorsed on the policy, yet if the agent of the company knew of an assignment not in accordance with such provision, and assented to it, the transfer will be held valid.

Griffin & Shook vs. Crescent Ins. Co., 1 Tex. Law Rev., 326.

Fire Ins. Ass'n vs. Miller Bros.

Rep'd Jour'l p. 56.

TEX. S. C.

§ 7. *LIFE—Effect on Title and Interest of the Insured in the Policy.*—The assignment of a policy of life insurance as collateral security for advances to be and which were made by the assignee, vests the legal title to the policy of the latter. The interest of the owner of the policy only extends to what remains of it after such advances have been repaid. Until such repayment the assignee cannot be made to surrender the policy.

Gilman vs. Curtis.

Rep'd Jour'l, p. 15.

CAL. S. C.

#### EVIDENCE.

§ 8. *LIFE.—Of Medical Attendants Inadmissible.*—The provision in the New York Civil Code that "a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient; in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that State, in trials at common law. Section 721 of the Revised Statutes, declaring that "the laws of the several States, except where the Constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to competency of witnesses, except as the latter subject may be regulated by specific provisions of the statutes of the United States.

Grattan vs. Metropolitan Life Ins Co., 92 N. Y., 274; Same vs. Same, 80 ib., 281; Pearson vs. People, 79 ib., 424; Edington vs. Aetna Life Ins. Co., 77 ib., 564; Edington vs. Mutual Life Ins. Co., 67 ib., 185; Potter vs. National Bank, 102 U. S., 165; Vance vs. Campbell, 1 Black, 427;



Wright vs. Bales, 2 ib., 535; McNeil vs. Holbrook, 12 Pet., 84; Sims vs. Hundley, 6 How., 1.

*Conn. Mut. Life Ins. Co. vs. Union Trust Co.*

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## INSURANCE.

§ 9. FIRE.—*Seller not Obligated to Effect.*—In the absence of a special contract the seller of goods is not bound to insure them nor to impart any information on the subject of insurance; the obligation imposed on him by the contract of sale is at most to place the goods in the hands of the carrier, and to receive and transmit a proper bill of lading.

*Bartlett vs. Jewett.*

Decision rendered Nov. 11, 1884.

IND. S. C.

## INSURABLE INTEREST.

§ 10. LIFE.—*Of Reputed Wife.—What Constitutes a Wife.—Waiver of Misrepresentations.*—A and B lived together as husband and wife and recognized each other as such in their intercourse with friends, for ten years, though no marriage ceremony had been performed. A provided for both, and B, like a wife, kept house for him; but in taking out a policy of insurance on his life for B's benefit, A had her name inserted as Mrs. B instead of Mrs. A. In an action by B on the policy, *Held*, That B was A's wife, and had an insurable interest in his life. Where, after discovering that an assured has made misrepresentations to it in his application for a policy, an insurance company continues to collect assessments, it thereby waives any right it may have to declare the policy obtained by such misrepresentations invalid.

*Watson vs. Centennial Mut. Life Ass'n.*

Rep't Jour'l, p. 73.

Mo. U. S. C. C.

## OTHER INSURANCE.

§ 11. FIRE.—*A Voidable Second Policy is a Violation of Provision Regarding.*—The policy on a dwelling provided that

other insurance without consent should render it void. The insured subsequently took out another policy containing a similar provision without consent. *Held*, That the second policy was not absolutely void, but only voidable at the option of the insured, and was a violation of the provision against other insurance in the first policy which defeated recovery.

*Baer vs. Phoenix Ins. Co.*, 4 Bush, 242; *Luggs vs. L. & L. & G. Ins. Co.*, Ky. C. A.

*Stevenson vs. Phoenix Ins. Co.*

*Rep'd Jour'l*, p. 68.

KY. C. A.

### POLICY.

§ 12. FIRE.—*What is an Open.*—An open policy is one in which the sum to be paid as an indemnity in case of loss is left open to be proved by the claimant in the case of loss, or to be determined by the parties.

*Fire Ins. Ass'n vs. Miller Bros.*

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### PREMIUM NOTE.

§ 13. LIFE.—*Effect of Non-payment of Interest in case of Dividends.*—A policy contained a provision that if the insured failed to pay the interest in cash on his premium notes the policy should be forfeitable, *Held*, the forfeiture was not valid or enforceable. The policy agreeing that the insured should be entitled to a share of the company's profits, *Held*, the company should have itself applied his share to pay the interest, though the policy also provided that such share should go to pay the principal of the notes.

*St. Louis Mut. Life Ins. Co. vs. Grigsby*, 10 Bush, 817.

*Northwestern Mut. Life Ins. Co. vs. Fort's Adm'r.*

*Rep'd Jour'l*, p. 26.

KY. C. A.

### PROOFS OF LOSS.

§ 14. FIRE.—*Policy Stipulation Must be Complied with.*—Where the policy contains a stipulation as a condition precedent

to the insured's right of action for damages for loss, that a statement of the loss be furnished the insurer, and there is no proof that such statement was made, plaintiff cannot recover.

*Fire Ins. Ass'n vs. Miller Bros.*

- §§ 6, 13.

### RISK.

§ 15. FIRE.—*Fireworks not Prohibited in Fancy Notions Store.—Evidence of Usage.*—The policy contained conditions dividing the property into not-hazardous, hazardous, extra hazardous and specially hazardous, firecrackers being denominated hazardous, Yankee notions extra hazardous, and fireworks specially hazardous. Above the specially hazardous list, it was stated the following merchandise to be covered must be specially written in the policy, under which was included fireworks. The policy also provided that if the property be used for storing or keeping any article more hazardous than called for by the original contract, except as provided for or agreed to in writing thereon, or if the risk shall be increased or the premises used for more hazardous purposes, notice should be given and indorsed, or the policy should be void. *Held*, That the policy was not violated by keeping of firecrackers in the stock of a store insured as a fancy goods and Yankee notions store.

*Pindar vs. Kings Co. Fire Ins. Co.*, 36 N. Y., 648; *Steinbach vs. Lafayette Fire Ins. Co.*, 54 N. Y., 90.

*Held*, That evidence was admissible to show that such articles were usual in such a store.

*Barnum vs. Merchants' F. Ins. Co.*

-§ 1.

§ 16. LIFE.—*What Constitutes Death in Violation of the Law.—Finding of Jury.*—The insured was shot and killed while engaged in a violent and unjustifiable assault. It was claimed that the shooting was accidental and involuntary on the part of the party assaulted. *Held*, That as the death was directly due to the assault, it was as much a death in violation of the law within

the policy as would be that of a burglar killed by an accidental fall while prosecuting a burglary.

*Bradley vs. Mut. Ins. Co.*, 45 N. Y., 422.

Where the finding of the jury can be justified from either of two interpretations of the evidence it cannot be impeached by showing that part adopted one interpretation and part another.

*Murray vs. N. Y. Life Ins. Co.*

*Rep'd Jour'l*, p. 48.

N. Y. C. A.

§ 17. LIFE.—*What Constitutes Death in Violation of Law.*—The answer averred that the insured while intoxicated did commit an assault and battery, and while thus engaged, was struck on the head by the husband of the assaulted party in her lawful defense, thus causing his death. The policy provided that it should be of no effect if the insured died by reason of intemperance, or in the known violation of the laws. *Held*, That the averment sufficiently set forth the facts of intoxication and violation of law, to put the appellant to a reply. *Held*, That the words "committing an assault and battery" have a settled meaning of which a court may take judicial cognizance as being a violation of the law. *Held*, That not every death while in known violation of law would render the policy void, the violation must be such as to increase the risk and the death a consequence which might perhaps have been reasonably expected. The law violated also should be one of which the violator may be expected to know.

Citing and discussing *Cluff vs. Ins. Co.*, 13 Allen, 308; *Burk vs. State*, 27 Ind., 430; *Burdetta vs. State*, 73 Ind., 185; *State vs. Smith*, 74 Ind., 557; *Bradley vs. Mut. etc. Co.*, 45 N. Y., 522; *Hatch vs. Mut. Life Ins. Co.*, 120 Mass., 550; *Muller vs. Mut. Ben. Ass'n*, 34 Iowa, 222; *Terre Haute etc. Co. vs. Buck*, 95 Ind., 346; *Cincinnati etc. Co. vs. Eaton*, 91 Ind., 474; *Dunlap vs. Wagner*, 35 Ind., 529; *Burford vs. Johnston*, 32 Ind., 426; *Billman vs. Indianapolis etc. Co.*, 76 Ind., 166; s. c., 40 Am. R., 230; 1 Hale, P. C., 428; 1 Hawk, P. C., 93; *Kelly vs. State*, 53 Ind., 311; *Harvey vs. State*, 40 Ind., 516.

*Bloom vs. Franklin Life Ins. Co.*

*Rep'd Jour'l*, p. 17.

IND. S. C.

## TITLE.

§ 18. ACCIDENT.—*What does not Constitute a Gift as against Creditors.*—A husband purchased an insurance ticket against accidents, and handed it to his wife, saying that she could take it and take care of it, and if he got killed before he got back she would be that much better off. He was killed. *Held*, That the conversation alluded to was not sufficient to establish a gift to the wife as against the rights of the creditors of her husband's estate.

Linsenbigler vs. Gourley, 6 P. F. Smith 168; Crawford's Appeal, 1 P. F. Smith, 52; Trough vs. Estate, 26 id., 115.

*Williams' & Harding's Appeal.*

Rep'd Jour'l, p. 12

P. & O.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME COURT OF PENNSYLVANIA.

*Appeals from Decree of the Orphans' Court of Wyoming County.*

**WILLIAMS' APPEAL.**

**HARDING'S APPEAL.\***

A husband purchased an insurance ticket against accidents, and handed it to his wife, saying, that she could take it and take care of it, and if he got killed before he got back she would be that much better off. He was killed. *Held*, That the conversation alluded to was not sufficient to establish a gift to the wife as against the rights of the creditors of her husband's estates.

JOHN A. SITTSE, and MESSRS. W. E. & C. A. LITTLE, *for Appellants.*

STEBBIN JENKINS and GARRICK M. HARDING, *for Appellee.*

MERCUR, C. J.

These two appeals are from the same decree. They were argued together. The appellants are creditors of the estate of H. P. Hall-

\* Decision rendered May 19, 1884. From *Legal Intelligencer*.

stead, deceased. The contention is as to the ownership of a policy or ticket of insurance, procured by him in the Travelers' Insurance Company of Hartford, on his own person. It provided for the payment to him of fifteen dollars per week in case of accidental bodily injuries, or in case of death through such injuries, the sum of \$3,000. It was for two days only. During that time he sustained accidental bodily injuries which caused his death. The sum of \$3,000 was paid to his administrators by the insurance company; but the money is claimed by his widow under an alleged gift of the policy to her by Mr. Hallstead during his life. It appears that Mr. Hallstead procured this policy just before leaving home to be absent a few days. The only witness relied on to establish the alleged gift is Addie J. Knapp. Just before he started, she testifies, he came from the door with an insurance ticket in his hand. "He laid the ticket on the table right in front of Mrs. Hallstead and said, here is an insurance ticket. Mrs. Hallstead asked him what he had got that for? He said, that she should take it and take care of it, and if he got killed before he got back, she would be that much better off. He said \$3,000 better off. She made a slight remark that a fool and his money was soon parted, and he said it cost only fifty cents." Is that evidence sufficient to pass the title to this ticket from the husband to his wife? This policy must not be confounded with one which a husband may procure on his life, and, by the terms thereof, the money be made payable to his wife on his death. On the contrary, the person insured under this policy is expressly prohibited from making any disposition of it. A clause therein declares "the transfer of this ticket will forfeit all claims arising hereunder. Was then, the handing of this non-transferable ticket by the husband to his wife, accompanied by his statement and request as proved, sufficient to divest all his interest therein, and transfer the right of property to her? He did not say that he had procured it for her benefit. When a husband, about to leave home with the intention of being absent a few days, hands a paper to his wife, and makes the remarks stated, is it reasonable to presume that either of them understood she thereby acquired a right to it adverse to her husband? Unless she there and then acquired such adverse right the gift was not executed: *Linsenberg vs. Gourley*, 6 P. F. Smith, 166. If he had sustained such injuries as would have made the company liable to pay fifteen dollars a week for twenty-six consecutive weeks, did the parties to this transaction understand that the wife could draw that money to the exclusion of her husband? It is very clear the lan-



guage used justified no such conclusion. In arriving at the intention of the parties, we must recognize the confidential relations which exist between husband and wife, as well as the fact that, in his absence, his valuable papers left at home depend largely on her care for their protection and security. The fact of leaving the policy in her care, and requesting her to take care of it, imposed no unusual duty on a wife. The casual remark that, in case of his death, she would be \$3,000 better off, reasonably interpreted, meant, his estate would amount to that much more. It is not denied that a husband may make a valid gift to his wife of money or chattel by delivery of possession and language proving such intention : Crawford's Appeal, 11 P. F. Smith, 52. It should, however, clearly show an intention to part with both possession and property. Either one alone is not sufficient : Trough vs. Estate, 25 id., 115. A careful consideration of this whole transaction fails to convince us that the husband intended to part with his right of property in the policy when he handed it to his wife. His language fairly interpreted conveys no such idea. There is no evidence that she understood, when she received it, that she took it otherwise than as his custodian, to hold it in his absence. Her possession was his possession. Her subsequent action in regard to the policy clearly shows this to have been her understanding. Soon after the death of her husband letters of administration on his estate were granted to her and one George S. Harding. The auditor found as a fact that the inventory and appraisal filed in the register's office, and purporting to have been made at the request of both of said administrators, contained an item for "life insurance" for a specific sum, which included this accident policy in question. Conceding that act, under the circumstances shown, may not operate as an estoppel so as to bar her right to the proceeds of the policy, if otherwise entitled thereto, yet it is certainly persuasive evidence that she did not then claim it in her own right. This item was not included in the inventory without her knowledge, for her attention was called to it at the time. We therefore conclude there was no intention to transfer to his wife any right of property in the policy, and the learned judge erred in holding otherwise.

Decree reversed at the costs of the appellees ; the exceptions to the report of the auditor are dismissed, and the account as re-stated by him is confirmed.

## SUPREME COURT OF CALIFORNIA.

GILMAN

vs.

CURTIS.\*

The assignment of a policy of life insurance as collateral security for advances to be and which were made by the assignee, vests the legal title to the policy of the latter. The interest of the owner of the policy only extends to what remains of it after such advances have been repaid. Until such repayment the assignee cannot be made to surrender the policy.

C. F. HANLON and G. W. TYLER, *for the Appellant.*

H. G. SEIBERST and G. F. SHARP, *for the Respondent.*

ROSS, J.

Taking the most favorable view for the plaintiff of this case, as presented, it is clear that the decree entered in the court below cannot stand. Conceding that it appears with sufficient certainty that the policy in question was assigned by the plaintiff to the defendant to be held by him as collateral security for certain advances to be and which were made by him, the legal title to the policy passed by the assignment to the defendant. The court should not, therefore, have adjudged the plaintiff the owner of the policy and entitled to receive from the insurance company the whole amount due upon it. The interest of the plaintiff in the policy, upon that condition of fact, is in what remains of it after the advances, for the security of which it was assigned, have been satis-

\* Opinion filed November 20, 1884. From *W. C. Reporter*.

fied, and defendant cannot be made to surrender it to the plaintiff until the advances made by him are repaid.

But the special issues, which were adopted by the court below as its findings, are indefinite, uncertain and inconsistent. For example, upon an important question in the case the answers of the jury to questions propounded were as follows :—

“8. When plaintiff re-assigned the policy to her mother, did she make such assignment absolutely for the benefit of her mother ?

“Answer—For the benefit of her mother.

“9. If such assignment was not made absolutely and solely for the mother's benefit, was it made with an understanding that Mrs. Curtis or defendant, Gilbert Curtis, should hold the policy subject to a trust in favor of plaintiff?

“Answer—Yes.”

Judgment and order reversed and cause remanded with leave to the parties to amend their pleadings if they shall be so advised.

MORRISON, C. J., SHARPSTEIN, J., MYRICK, J., MCKEE, J., THORNTON, J., and MCKINSTRY, J., concurred.

## SUPREME COURT OF INDIANA.

MAY TERM, 1884

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*Appeal from the Marion Superior Court*

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HELEN BLOOM ET AL.

vs.

FRANKLIN LIFE INS. CO.\* }

The answer averred that the insured while intoxicated did commit an assault and battery, and while thus engaged, was struck on the head by the husband of the assaulted party in her lawful defense, thus causing his death. The policy provided that it should be of no effect if the insured died by reason of intemperance, or in the known violation of the laws.

*Held*, That the averment sufficiently set forth the facts of intoxication and violation of law, to put the appellant to a reply.

*Held*, That the words "committing an assault and battery" have a settled meaning of which a court may take judicial cognizance as being a violation of the law.

*Held*, That not every death while in known violation of law would render the policy void, the violation must be such as to increase the risk and the death a consequence which might perhaps have been reasonably expected. The law violated also should be one of which the violator may be expected to know.

ELLIOTT, C. J.

The policy of insurance upon which the appellant's complaint is founded, contains a provision that if the assured shall die by reason of intemperance from the use of intoxicating liquors, or in the known violation of the laws of the States or of the United States, the policy shall be void. The answer of the appellee after setting forth the provision of the policy, proceeds as follows: "And this

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\* Decision rendered October 28, 1884.

defendant avers that the said August Bloom, the assured, came to his death in the following manner, to wit. On or about the 29th day of December, 1881, the said August Bloom, while in a state of intoxication from the use of intoxicating liquors, did commit an assault and battery upon one Wilhelmina Bloom, the wife of his brother, Albert Bloom, at the town of Aurora and State of Indiana, and while thus engaged in penetrating said assault and battery and while violently beating, bruising, choking and maltreating her, the said wife of his brother, he, the said August being at the time in a state of intoxication, his brother, the said Albert, did then and there, for the purpose of lawfully defending his wife against said assault and battery, strike the said August Bloom upon the head with a jack-plane, or some other wooden instrument, thereby fracturing the skull of him, the said August, and causing his death within a few hours thereafter." There can be no question as to the force and validity of the provision of the policy declaring it to be of no effect in the event that the assured shall come to his death from the effects of intemperance, or while engaged in willful violation of the law, we do not, indeed, understand the appellant as insisting upon the invalidity of this provision, but as asserting that the facts stated do not show that the assured died from the effects of intemperance, or that he met his death while engaged in knowingly violating the law.

We do not think that an answer averring that the assured came to his death while engaged in violating the law, need be framed with the same precision as would be necessary in an indictment in a criminal prosecution. The rules of pleading in civil cases are not so rigid and strict as they are in prosecutions for criminal offenses. We cannot, therefore, accept as a just standard the rule which obtains in cases of indictments, but even in such cases the pleading is good if it describes the offense in the language of the statute or in the language of equivalent meaning.

The answer charges that the assured did commit an assault and battery, and then sets forth the facts constituting the offense. It is true that the language of the statute defining the offense is not pursued, but we do not think this was necessary, for all that it was incumbent upon the appellee to do, was to state such facts as would enable the court to conclude as matter of law, that there was an assault and battery committed. The facts stated warrant this conclusion. It is not necessary in a complaint to anticipate defenses, nor is it necessary in an answer to anticipate matters that might be

replied in avoidance, in the one case it is sufficient to make a prima facie cause of action, in the other, to make a prima facie defense. We can see no reason for taking this case out of the general rule. It is true, forfeitures are odious, and that courts are slow to enforce them, but this consideration does not affect the rules of pleading. The reluctance of courts to enforce forfeitures does not change the rules of pleading, but does, in high degree, affect the causes assigned in support of the claim of forfeiture. The question under the rule against enforcing forfeitures is, not in what manner are the grounds of forfeiture pleaded, but the question is, what are the grounds? Are they so important and material as to compel a declaration of forfeiture? If, in this case, the answer shows that the assured came to his death in the known violation of law, then there is a cause of forfeiture shown, no matter how inartistically drawn the pleading may be; for the inquiry is, not as to the manner of pleading, but as to the substance of the plea. It seems quite clear that the facts stated would be abundantly sufficient in a complaint to recover damages for an assault and battery, and if this be true, there is no reason why they should not be sufficient where the assault and battery is pleaded as a defense. If the facts are such as show an assault and battery, then, if an assault and battery is a defense the pleading is sufficient, no matter what may be the character of the action in which it is interposed. The pleading under immediate mention does state facts constituting an assault and battery and does show an offense involving a willful violation of law. At all events the facts stated in the answer, and admitted by the demurrer, are enough to put the appellant to a reply. Granting it to be true, as decided in *Cluff vs. Mutual Insurance Company*, 13 Allen, 308, that the violation of law must, in order to avoid the policy, be a breach of some criminal statute, still, the answer is good, for courts judicially know that an assault and battery is an offense punishable as a crime. The words assault and battery employed in the answer, have, and for centuries have had, a definite and settled meaning and we can assign that meaning to them not only without encroaching upon any rule of law, but in close harmony with long and firmly settled principles. We may with justice and propriety apply to the pleading before us the rule adopted in *Burk vs. State*, 27 Ind., 430, where it was held that a crime was well defined if the legislature employed a phrase of a definite and settled meaning. In that case the phrase was "public nuisance" and it was held to be a sufficient definition of the

offense. *Berdetta vs. State*, 73 Ind., 185, vide opinion, 196; s. c. 38 Am. Rep., 117.

Taking the general words as used in the answer and the statement of specific facts, it appears with reasonable certainty, that there was a violation of a criminal statute. We do not affirm that the words assault and battery would of themselves be sufficient, not that by any means, but as we do affirm that the words used as they are in that clause of the answer reading, "while thus engaged in perpetrating the said assault and battery, and while violently beating, bruising, choking and maltreating her, the said wife of his brother," are to be considered in determining the character of the violence used upon the person of Mrs. Bloom.

The words have a settled meaning quite as full and definite as the word unlawful, and it is but following the ruling in *Burk vs. State*, supra, to give them their well-known meaning. If the word unlawful had been used the substantial requisites of an indictment would have been present. *State vs. Smith*, 74 Ind., 557.

It seems to us that the words used, taken in connection with those with which they are immediately associated, and in connection with the clause contained in the concluding part of the answer which reads: "And this defendant says that by reason of his said intoxication and of his said violation of the law in committing such assault and battery, the said August Bloom was then and therein the known violation of the laws of Indiana," fully show that an offense punishable by the criminal laws of the State was committed by the assured.

We do not hold that the averments in the concluding part of the answer control, but do hold that in determining the whole tenor and drift of the pleading they are proper for consideration.

The soundness of the decision in *Cluff vs. Mutual Ins. Co.*, supra, upon the point immediately under discussion is questioned in the well-considered case of *Bradley vs. Mutual etc. Co.*, 45 N. Y., 522, and was denied in the same case by the Supreme Court of New York. It does seem a wide stretch of judicial power to affirm that a clause reading, "Or in case the assured shall die by his own hand, or in consequences of a duel, or by reason of intemperance from the use of intoxicating liquors, or by the hands of justice, or in the known violation of the laws of these States, or of the United States, or of any other country which he may visit, this policy shall be void, refers solely to criminal laws."

If the words employed are taken in their usual signification it



would seem quite clear that death in the known violation of any law, criminal or civil, would make the policy inoperative.

An illustration was put by Grover, J., in *Bradley vs. Mutual etc Co.*, which goes far to show the unsoundness of the decision in *Cluff vs. Mutual Ins. Co.* "Again, suppose the death occurred from injury received while the assured was attempting to obtain, by force, the possession of a chattel of which another was in peaceable possession, the title to which was claimed by both, but which was really in the assured, the case would come within the proviso for the reason that the risk was increased, and the death caused by the violation of the law by the assured, although such law was the civil law only, the deceased having committed no breach of the peace or any indictable offense." Suppose as a further illustration, that the law prohibits a passenger from standing on the platform of a railway car, while in motion, or that it prohibits persons from approaching within a specified distance of a blast about to be fired, would not a known violation of such a law increase the risk and be within the letter, and the spirit of the provision in the policy?

On the other hand it is not every violation of law which should absolve the company, even though the law be a criminal one. Suppose a man violates our law against profanity and is shot while doing it, should that absolve the company from liability? Again, suppose a man violates our Sunday law by fishing and while committing the offense is shot and killed, would that relieve the company? In a late case, *Hatch, Adm., vs. Mutual Life Ins. Co.*, 120 Mass., 550, a rule was declared which it seems difficult, if not impossible, to reconcile with that laid down in *Cluff vs. Mutual etc. Co.*, for it was held in the later case that where an assured submits to a surgical operation for the purpose of producing abortion there can be no recovery upon the policy.

It is true that the opinion puts the decision upon the ground of public policy, but when the real reason for the decision is reached it will be found that it rests upon the ground that the act was in violation of the rights of the insurance company, for an act against public policy cannot relieve the company unless it is one increasing the risk. If a man should violate public policy by entering into an illegal conspiracy to prevent competition at a public sale and this should lead to his death, we suppose no one would claim that because his act was against public policy the insurance contract was avoided. Again, if an assured should enter into a conspiracy to corruptly control the acts of a government official, or should enter into a mar-

riage brokerage contract, and these acts should lead to his death, it would be clear that the policy of insurance would not be rendered void.

In our opinion the law is this: A known violation of a positive law, whether the law is a civil or a criminal one, avoids the policy, if the natural and reasonable consequences of the violation is to increase the risk; a violation of law, whether the law is a civil or a criminal one, does not avoid the policy if the natural and reasonable consequence of the act does not increase the risk. Whether the violation of law was the proximate cause of death and whether it was an act increasing the risk must in general be determined from the facts of the particular case. There must in all cases, whether the law violated be a criminal or a civil one, be some causative connection between the act which constituted the violation of law and the death of the assured.

A man engaged in uttering counterfeit money might meet his death while so engaged and yet there might be circumstances which would destroy the causal connection between the death and the violation of law, and in such a case it is clear that the company would not be relieved from liability. On the other hand, an assured might bring on his death while engaged in the violation of a civil law, as, for instance, in the case of an attempt to force an entrance into a man's house for the purpose of arresting him on civil process.

Another illustration may be found in the case of a railway engineer, who in violation of law neglects to sound signals and brings on a collision in which he perishes and a kindred example is supplied in cases of collisions at sea or on navigable streams, brought about by a violation of maritime laws. It would not be difficult to multiply examples proving that the rule must be that the known violation of a positive law relieves the company where the act constituting the violation is the proximate cause of death, whether the positive law violated be a civil or a criminal one.

The act of the assured in this case was the proximate cause of his death within the meaning of the law. A man who makes a violent assault upon a woman puts his own person in danger, for a father, a husband, or a child may interfere to protect the assailed woman, and may overcome the assailant by force. Strangers not only may interfere to protect the person violently assaulted, but are, in strict law, under a duty to interfere. The natural result of such an illegal act as that of the assured therefore was to bring his person into anger, and as death resulted, his own act was the proximate cause.

It may well be doubted whether an assured who violently assaults another does not cause a forfeiture even though the rescuer uses excessive force, but that point we need not decide, for the interference in this instance was a lawful one. While the unlawful act of the assured must tend in the natural line of causation to his death in order to work a forfeiture, it is not necessary that the act should be the direct cause, nor that the precise consequences which actually followed could have been foreseen. It is enough if the act is unlawful in itself, and the consequences flowing from it are such as might have been reasonably expected to happen, then death is the proximate result, for in such case the ultimate result is traced back to the original proximate cause. *Terre Haute etc. Co. vs. Buck*, 95 Ind., 346 ; *Cincinnati etc. Co. vs. Eaton*, 94 Ind., 474 ; *Dunlap vs. Wagner*, 35 Ind., 529 ; *Burford vs. Johnston*, 32 Ind., 426 ; *Billman vs. Indianapolis etc. Co.*, 76 Ind., 166 ; s. c., 40 Am. R., 230.

In the case of *Cluff vs. Mutual Benefit*, *supra*, the decision was that where the assured made an assault upon another and the person assaulted killed him, the policy was forfeited. The same general doctrine was maintained in *Bradley vs. Mutual Benefit Ins. Co.*, *supra*, but it was held that where there was any conflict of evidence the question whether the death was the natural result of the wrongful act must be left to the jury.

In the case of *Insurance Co. vs. Seaver*, 19 Wall., 531, the assured was driving in a race, a collision took place, he leaped from his sulky and was killed, and the court held that death was proximately caused by the unlawful act of racing. The subject received consideration in *Muller vs. Mutual Benefit Ass'n.*, 34 Iowa, 222, where the assured while suffering from a fit of delirium tremens escaped from his keepers, ran out into the street in very inclement weather, and by the exposure brought on a form of disease which was the immediate cause of death. The court held that the proximate cause of death was the excessive use of intoxicating liquor.

But there is really no reason for endeavoring to find insurance cases, for the fundamental principles must be the same whether the contract is one of insurance or an ordinary commercial agreement. The fundamental principle is as old as the "Squib Case" on the civil side of the common law, and on the criminal side as old, at least, as the time of Sir Matthew Hale. 1 Hale, P. C., 428 ; 1 Hawk, P. C., 93 ; *Kelly vs. State*, 53 Ind., 311 ; *Harvey vs. State*, 40 Ind., 516 ; *Terre Haute etc. Co. vs. Buck*, 96 Ind., 346, *vide* *auth.*, p. 350, courts cannot be ignorant of the nature of men, and

must attribute to them the ordinary passions and weaknesses inherent in human nature. It has been expressly adjudged that courts may presume that domestic animals will act in conformity with their usual propensities and habits, and surely there is stronger reason for extending this principle to beings of intelligence, reason and affections. Wharton's Negligence, sections 100-107. *Billman vs. Indianapolis etc. Co.*, *supra*. It has, indeed, been laid down by respectable authority that notice will be taken of the habits of men acting in masses, and if this be true it must also be true that notice will be taken of what an ordinary man would likely do under a known state of affairs. Wharton, Negligence, section 108. These considerations lead to the conclusion that a man who beats and maltreats another's wife may reasonably expect the husband to defend her without being careful as to means of defense or to nicely weigh the degree of force. To expect a husband to act coolly and with careful circumspection in such a case is to expect an unreasonable thing.

The probability is that the husband would in such a case use force, and this makes it probable that the one who assaults the wife will encounter force at the hands of the husband, and what is probable is, in legal contemplation, to be expected. *Billman vs. Indianapolis etc. Co.*, *supra*, and authorities cited. If, therefore, an assured does assault another's wife, he does an unlawful thing which he must expect will bring upon him violence from the husband, and if this force leads to death, then the proximate cause of death is the unlawful act which provoked the use of violence.

The violation must be a known one, and we are inclined to think that the law violated must be a known one, that is, must be one of which the violator has, or should have, actual knowledge. But there are many things of which no man can be ignorant and among the things of which no one can be ignorant, are that it is against the law to commit murder, to steal, or to violently beat another.

We cannot doubt that the beating of Mrs. Bloom was an act known by the assured to be a violation of law. The fact that the assured was intoxicated when he committed the assault and battery upon his brother's wife does not change the law. Drunkenness is no excuse for crime. *Goodwin vs. State*, 9 Ind., and authorities cited. A man who voluntarily makes himself drunk is in a measure responsible for his own irresponsibility. But waiving this consideration the degree of intoxication does not appear to have affected the mental capacity of the assured, and the presumption is here, as in all cases, that the mental condition was a normal one.

There is no force in the proposition that the assured did not lose his life in a known violation of law, but in consequence of the violation. The cause of the cause is in law sufficient, and the cause of the cause of death was the blow given while the assured was in the act of violating the law, and it is not material whether death did or did not immediately ensue.

What we have said disposes of all the questions in the case and it is not necessary to examine the special finding.

Judgment affirmed.

## COURT OF APPEALS OF KENTUCKY.

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*Appeal from Louisville Chancery Court.*

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NORTHWESTERN MUTUAL LIFE INS. CO. }

vs. }

FORT'S ADM'R.\*

A policy contained a provision that if the insured failed to pay the interest in cash on his premium notes the policy should be forfeitable, *Held*, the forfeiture was not valid or enforceable.

The policy agreeing that the insured should be entitled to a share of the company's profits, *Held*, the company should have itself applied his share to pay the interest, though the policy also provided that such share should go to pay the principal of the notes.

BARNETT, NOBLE & BARNETT, *for Appellants.*

TEMPLE BODLEY and C. S. GRUBBS, *for Appellee.*

LEWIS, J.

On the 17th of January, 1868, in consideration of the annual premium in advance, consisting of an annual premium note of \$194, the interest on which was to be paid annually in cash at the date of the maturity of the annual premium, and of the quarterly cash premium of \$72.10 to be paid at or before the 17th of January, April, July and October in every year during the first ten years of the continuance of the policy then issued, the Northwestern Mutual Life Insurance Company insured the life of Sugg Fort for the use and benefit of Virginia C. Fort, his wife, in the amount of \$10,000 for the term of his natural life.

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\* Opinion filed Oct. 14, 1864 From *Kentucky Law Reporter*.

The annual premium notes were executed according to the contract in January of the years 1868, 1869, 1870 and 1871, and the interest on each of them, except the last mentioned, was paid up to the date of the maturity of the third annual premium, and the quarterly cash premiums were also paid up to April 17, 1871. But no other notes were given, nor interest or cash premiums paid thereafter.

Sugg Fort died in 1882, and this action was instituted in February, 1883, by the administrator of Virginia C. Fort, who died after her husband, to recover the sum of \$3,500, being three and one half tenths of the amount of the policy. And in an amended petition judgment was also asked for a due proportion of the surplus dividends accruing after the assured ceased to keep up the policy.

The chancellor rendered judgment in favor of the plaintiff for the sum of \$3,000, and interest thereon from the time the action was commenced, subject to a credit of \$598.60 and interest thereon at the rate of seven per cent per annum from January 17, 1871, to the date of the judgment, being the amount of the four premium notes left after deducting \$77.40, the proportion of the "surplus" on the business of the company for the years 1868, 1869 and 1870, to which the assured was adjudged to be entitled according to the terms of the policy.

From that judgment the defendant has appealed, and the plaintiff prosecutes a cross-appeal, the former contending the court erred in rendering judgment for any amount, and the latter that the judgment should have been for \$3,500; that he should have been charged with only three of the premium notes; and that the defendant should have been charged with a due proportion of the surplus on the business of each year since January, 1871.

The following are the provisions contained in the policy that have a bearing on the questions presented:—

"The said company doth hereby promise and agree to pay said sum assured \* \* in sixty days after due notice and proof of the death of the said person whose life is hereby assured, the balance of the year's premium and all notes given for premiums, if any, being first deducted therefrom.

"At each distribution of the surplus after three years from the date hereof, a due proportion of such surplus on each and every year's business, during the continuance of this policy will be returned to the said assured.

"And the said company further promises and agrees that if de-



fault shall be made in the payment of any premium, it will pay as above agreed, as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default. But in order to secure such proportion of the policy all premium notes must be taken up, or the interest thereon be paid annually in cash on the date of the annual maturity of the premium until the notes are canceled by returns of the surplus or the whole policy will be forfeited.

"This policy is issued and accepted by the parties in interest on the following express conditions:— \* \*

"3d. If the said premiums, or the interest upon any note given for premiums shall not be paid on or before the days above mentioned for the payment thereof, \* \* then, and in every such case, the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine.

"4th. In every case where this policy shall cease or become null and void, all payments thereon shall be forfeited to the company. \*

"7th. This policy shall not take effect and become binding on the company until the premium shall be actually paid, during the lifetime of the person whose life is assured, to the company, or to some person authorized to receive it, who shall countersign the policy on receipt of the premium."

The defendant filed with its answer as an exhibit the four premium notes, which were retained by it from the dates they were respectively given. The first one of them, the others differing from it only as to date, is as follows:—

"MILWAUKEE, January 27, 1868.

"For value received, I promise to pay the Northwestern Mutual Life Insurance Company one hundred and ninety-four dollars, with interest at the rate of seven per cent per annum, which interest shall be paid annually, or the policy be forfeited; this note being given for part of the premium on policy No. 30,330 is to remain a lien upon said policy until it becomes due by limitation, or by the death of Sugg Fort, when the note shall be deducted from said policy unless sooner paid, the dividends on the policy are to be applied to the payment of the notes.

"V. C. FORT, BY SUGG FORT."

Neither in the policy, nor in the premium notes, is it stipulated

that they are to be paid at any fixed time, or at all events before the death of the person whose life is assured. On the contrary it is provided that whatever amount of the notes may be due after his death is to be deducted from the sum assured, the only provision for the payment of them or any part of them during his life being contained in the notes, where it is agreed that the dividends on the policy are to be so applied, which it is manifest are insufficient to liquidate them during an ordinary lifetime. It is therefore clear that the failure to pay off the notes during his life was not intended to work a forfeiture of the policy.

Nor is the failure to pay any cash premium made a cause of forfeiture, it being expressly provided otherwise. The only ground upon which it can be contended that the contract in terms, or by implication provides for a forfeiture of the whole policy is the failure to pay annually the interest on the premium notes. And whether such failure has worked a forfeiture in this case is the principal question.

The law does not favor forfeitures, and in order to justify the court in enforcing it in this case, it should be clearly and unambiguously so expressed in the contract, and the payment of the interest annually should be of the substance of the contract, and not then, if the company has waived the forfeiture.

We are not prepared to say that by the terms of this contract, construed and enforced according to the principles applicable to contracts generally a forfeiture has occurred.

The company in one clause of the policy binds itself to return to the assured at each distribution of the "surplus" after three years from its date a due proportion of such surplus on each and every year's business during the continuance of the policy. No condition is annexed to this undertaking, and we do not therefore see how it is possible the conclusion that the right of the assured to such surplus became vested immediately after the payment of the three annual cash premiums, and the execution of the three first premium notes, which was done before any default in the payment of the interest occurred, or a cause of forfeiture on any account existed.

It is also in another clause agreed in case of default in the payment of any premium, the company will pay as many tenth parts of the original sum as there shall have been complete annual premiums paid at the time of such default. It is true it is in the same clause provided that in order to secure such proportion all premium notes must be taken up, or the interest thereon paid annually in cash, on

the date of the maturity of the premium until the notes are canceled by return of the surplus, or the whole policy will be forfeited. But it is difficult to reconcile the forfeiting part of this clause with a subsequent one in which it is stipulated that in case of default in the payment of a premium or interest upon any notes "the company shall not be liable for the payment of the whole sum assured, but only for such part thereof as is expressly stipulated above, and the remainder shall cease and determine." And it is still more difficult to reconcile it with the preceding clause in which the return of the surplus to the assured is provided for.

If the rule to construe the language of a contract most strongly against the party employing it be applied in this case it would not be unreasonable to conclude that it was not the intention to forfeit the entire policy after there had been three complete annual cash premiums paid, and three premium notes executed and interest paid thereon.

But waiving that question we are clearly of the opinion that the stipulation for the cash payment of the annual interest on the notes on the date of the annual maturity of the premium should not be held as of the substance of the contract.

The right of the assured to a due proportion of the surplus dividends having after three years from the date of the policy become vested, as in our opinion was the case, there was in the possession of the company belonging to her an amount more than sufficient to pay the annual interest on the notes executed by her. This fund she was entitled to have returned to her, or applied to the payment of the interest accruing on the notes. It is true there is a stipulation contained in each note that "the dividends on the policy are to be applied to the payment of the notes." But it would not be inconsistent with that stipulation, nor with the right accorded to obligors of notes generally for the assured to have the election to apply the surplus dividends belonging to her to the payment first of the interest. Nor would the company have a right to complain, or be injured by such an application of the dividends; for by this process interest at the unusual and excessive rate of seven per cent would be annually compounded, while the interest-bearing principal of the note would remain intact.

But whatever may have been the rights of the assured in respect to the application of the surplus dividends belonging to her, the company has neither returned to her any part of them, nor credited the notes thereby. Having then appropriated and used for its own

benefit the fund, which was more than sufficient to pay the interest on the notes, the company should not be now permitted to claim a forfeiture upon the ground of the non-payment by the assured of that interest.

Moreover, by the terms of the contract the annual payment of the interest as well as the ultimate payment of the notes was secured ; for the lien retained on the policy comprehended the interest as well as the principal, and the company was fully indemnified against the loss of either.

There are, therefore, two reasons why the forfeiture of the entire policy should not be enforced. In the first place, having funds of the insured in its possession more than sufficient to pay the annual interest, which it has not accounted for otherwise, the company should be held to have applied it to the payment of the interest, and consequently there has been in legal contemplation no default on the part of the assured in respect to the annual payment of the interest.

In the second place, inasmuch as the company was fully secured against loss of either principal or interest, and in fact had in its possession the means with which to meet the interest, the forfeiture provided for in case of default in payment of the interest must be regarded "as a penalty to secure not the ultimate, but the prompt payment of such interest," and therefore not enforceable.

This question has been already passed upon by this court in the case of *St. Louis Mut. Life Ins. Co. vs. Grigsby*, 10 Bush., 317 ; and as we think the ruling was correct it must be adhered to.

It is true in that case after a default in the payment of cash premiums the policy was commuted and a new certificate issued. But the question whether default in the payment of the annual interest worked a forfeiture of the policy was presented, considered and decided by the court.

There it was held that as the default was only in time, and as the company could be given all that it stipulated to receive, a case was presented in which relief against a forfeiture could and ought to be afforded.

Here the default, if any has occurred, is not of the substance of the contract, but in time of the payment of interest, and the company can be given all that it stipulated to receive. On the other hand to forfeit the whole policy on account of default in time of payment of the interest, which formed but a small part of the consideration, and which the company is fully secured in the ultimate

payment of, if not already paid, would impose upon the insured the entire loss of the premiums actually paid.

A forfeiture under such circumstances would be extremely oppressive, and if provided for in a contract between individuals concerning any ordinary business transaction be held as in the nature of a penalty. And as we are unable to perceive any reason for changing or relaxing the rule in respect to contracts about the business of life insurance, the forfeiture provided for in this case must be likewise so held.

It is therefore not necessary to decide whether there has been any waiver of the forfeiture by the company.

We do not, however, agree with counsel for appellee that he is entitled to recover more than three tenths of the sum assured. For the language of the policy is that if default be made in the payment of any premium, the company will pay only "as many tenth parts of the original sum assured as there shall have been complete annual premiums paid at the time of such default."

It is not pretended that more than three complete annual premiums have ever been paid, and hence only three tenths of the sum assured can, according to the contract, be recovered. To render judgment for more would be to disregard the language and pervert the obvious meaning of the contract.

There is no provision for canceling any of the notes. And as the one executed in January, 1871, was voluntarily given by the assured, appellee should not be permitted to repudiate it, but it must be regarded like the other three as forming part of the consideration for what he is seeking to recover from the company.

Nor do we think that after the assured refused to pay any other cash premiums, to execute any other notes, or to make cash payment of the annual interest she was entitled to a full participation in the profits; certainly no more than necessary to offset the interest accruing on the notes given.

Wherefore the judgment is affirmed on the original and cross-appeal.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1884.

*In Error to the Circuit Court of the United States for the Southern District of New York.*

CONNECTICUT MUT. L. INS. CO., *Plaintiff in Error,*

vs.

UNION TRUST CO. OF NEW YORK, *Trustee for the*  
*Children of Wm. Orton, Deceased.\**

The provision in the New York Civil Code that "a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity," is obligatory upon the courts of the United States, sitting within that State, in trials at common law.

Section 721 of the Revised Statutes, declaring that "the laws of the several States, except where the Constitution, treaties, and statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law in the courts of the United States, in cases where they apply," relates to the nature and principles of evidence, and also to competency of witnesses, except as the latter subject may be regulated by specific provisions of the statutes of the United States.

To the question, in an application for insurance upon life, whether the applicant had ever had the disease of "affection of the liver," the answer was No: Held, that the answer was a fair and true one, within the meaning of the contract, if the insured had never had an affection of that organ which amounted to disease, that is, of a character so well defined and marked as to materially disturb or derange for a time its vital functions; that the question did not require him to state every instance of slight or accidental disorders or ailments, affecting the liver, which left no trace of injury to health, and were unattended by substantial injury, or inconvenience, or prolonged suffering.

\* Decision rendered November 17, 1884.

An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties, without stating specifically the modification to which objection is made, is too vague and indefinite.

HARLAN, J.

This is an action upon a policy of life insurance in which a verdict and a judgment were rendered for the plaintiff. The policy was taken out on the 21st of February, 1878, by the Union Trust Company of New York for the benefit of the children of William Orton who might survive him. The insured died on the 22d of April of the same year. In the application, signed by the trust company and by Orton, the following question (the seventh) was propounded: "Have you ever had any of the following diseases? Answer (yes or no) opposite each." Then follows a list of the diseases about which the applicant was asked—apoplexy, paralysis, insanity, epilepsy, habitual headache, fits, consumption, pneumonia, pleurisy, diphtheria, bronchitis, spitting of blood, habitual cough, asthma, scarlet fever, dyspepsia, colic, rupture, fistula, piles, affection of liver, affection of spleen, fever and ague, disease of the heart, palpitation, aneurism, disease of the urinary organs, syphilis, rheumatism, gout, neuralgia, dropsy, scrofula, smallpox, yellow fever, and cancer or any tumor. As to colic, fistula, and fever and ague, the answer was Yes, and as to all the other diseases, No. Being asked, in the same question, to state the number of attacks, character and duration, of all the diseases which he had had, the applicant answered: "Had fistula in 1871, induced by intermittent fever; radically cured."

The eighth question was: "Have you had any other illness, local disease, or personal injury; and if so, of what nature, how long since, and what effect on general health?" The answer was: "Had colic for one day, October, 1877; no recurrence; general health good."

The fourteenth was: "How long since you were attended by a physician; in what diseases? Give name and residence of such physician." The answer was: "October, 1877; for colic; Dr. Hasbrouck, of Dobb's Ferry; sick one day."

The fifteenth was: "Is there any fact relating to your physical condition, personal or family history, or habits, which has not been stated in the answers to the foregoing questions, and with which the company ought to be made acquainted?" The answer was: "No; nothing to my knowledge."

The sixteenth was: "Have you reviewed the answers to the

above questions, and are you sure they are correct?" The answer was, Yes.

The application concluded in these words :—

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions ; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company."

Upon the back of the application were several indorsements, among them the following :

"**PROOFS OF DEATH REQUIRED.**—Blanks for the several certificates required to be made in proof of death will be furnished upon request."

The policy purports to have been issued in consideration of the representations and declarations made in the application, and of the payment of the annual premium at the time designated therein. It purports, also, to have been issued and accepted upon certain express condition and agreements, among which are : "That the answers, statements, representations, and declarations contained in or indorsed upon the application for this insurance—which application is hereby referred to and made part of this contract—are warranted by the assured to be true in all respects, and that, if this policy has been obtained by or through any fraud, misrepresentation, or concealment, then this policy shall be absolutely null and void."

This action was brought to recover the amount insured—due notice and satisfactory evidence of death having been given. The company resisted recovery upon two grounds :—

1. That the answers to the seventh, eighth, fourteenth, and sixteenth questions were false and untrue, and known to be by Orton, in this : that so far from his general health being good at the time of the making and delivery of the application and of the issuing of the policy, he had, for many years immediately prior thereto, suffered with piles, affection of the liver, and habitual headache, and within less than eighteen months prior to the application had been seriously ill for weeks, during which period several physicians attended him ; that the illness in October, 1877, continued for some days ; that he visited Europe upon one or more occasions for the



benefit of his health, and by reason of disease was much enfeebled in body ; that at the time of issuing the policy defendant did not know or have reason to believe that said statements, answers, and declarations, or any of them, were untrue, but, believing them to be true, issued the policy ; and that by reason of these facts it was null and void.

That in the application it was declared that the statements therein were correct and true, and that there was not, to the knowledge of the insured, any fact relating to his physical condition, personal or family history, or habits, not stated in answer to the questions in the application, with which the officers of the defendant ought to be made acquainted ; yet, he had been and was subject to and afflicted with the diseases therein specified ; had a very serious illness and been attended by several physicians ; was ill in October, 1877, much longer than stated ; and had visited Europe for his health ; which facts were within his knowledge, and were material circumstances in relation to the past and present state of his health, habits of life, and condition, rendering an insurance on his life more than usually hazardous and with which the officers of the company should have been made acquainted ; but these facts were concealed from, and misrepresented to the company by Orton, whereby it was injuriously influenced, and induced to omit such examinations and precautions in reference to his condition and health as would have prevented the issuing the policy upon the considerations and conditions therein set forth ; and that, by reason of such concealment and misrepresentation, the policy was and is absolutely null and void.

1. In support of the defense, physicians, who had attended the insured professionally, were examined as witnesses ; and the first assignment of error relates to the refusal of the court to permit them to answer questions, the object of which was to elicit information which would not have been allowed to go to the jury, under section 834 of the Code of Civil Procedure of New York, had the action been tried in one of the courts of the State. That section provides that " a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." It is not, and could not well be, seriously questioned, that the evidence excluded by the circuit court was inadmissible under the rule prescribed by that section. *Grattan vs. Metropolitan Life Ins. Co.*, 92 N. Y., 274 ; Same

vs. Same, 80 ib., 281 ; Pearson vs. People, 79 ib., 424 ; Edington vs. *Ætna Life Ins. Co.*, 77 ib., 564 ; Edington vs. *Mutual Life Ins. Co.*, 67 ib., 185.

But it is suggested that truth and justice require the admission of evidence which this statutory rule, rigorously enforced, would exclude, and that it can be admitted without disturbing the relations of confidence properly existing between physician and patient ; that it would not afflict the living nor reflect upon the dead, if the physician should testify that his patient had died from a fever, or an affection of the liver ; and that the rule, as now understood and applied in the courts of New York, shuts out, in actions upon life policies, the most satisfactory evidence of the existence of disease, and of the cause of death. These considerations, not without weight, so far as the policy of such legislation is concerned, are proper to be addressed to the legislature of that State. But they cannot control the interpretation of the statute, where its words are so plain and unambiguous as to exclude the consideration of extrinsic circumstances. Since it is for that State to determine the rules of evidence to be observed in the courts of her own creation, the only question is whether the Circuit Court of the United States is required, by the statutes governing its proceedings, to enforce the foregoing provision of the New York Code. This question must be answered in the affirmative. By section 721 of the Revised Statutes, which is a reproduction of the 34th section of the Judiciary Act of 1789, it is declared that "the laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision, in trials at common law, in the courts of the United States in cases where they apply." This has been uniformly construed as requiring the courts of the Union, in the trial of all civil cases at common law, not within the exceptions named, to observe, as rules of decision, the rules of evidence prescribed by the laws of the States in which such courts are held. *Potter vs. National Bank*, 102 U. S., 165 ; *Vance vs. Campbell*, 1 Black 427 ; *Wright vs. Bales*, 2 ib., 535 ; *McNeil vs. Holbrook*, 12 Pet., 84 ; *Sims vs. Hundley*, 6 How., 1.

There is no ground for the suggestion that sections 721, 858, and 914 of the Revised Statutes may be construed as relating to the competency of witnesses rather than to the nature and principles of evidence. While in some of the cases the question was whether a witness, competent under the laws of a State, was not, for that reason, under the 34th section of the act of 1789, a competent wit-

ness in the courts of the United States sitting within the same State, in others the question had reference to the intrinsic nature of the evidence introduced. In *McNeil vs. Holbrook* the court held the courts of the United States, sitting in Georgia, to be bound by a statute of that State declaring, as a rule of evidence, that in all cases brought by an indorser or assignor on any bill, bond, or note, the assignment or indorsement, without regard to its form, should be sufficient evidence of the transfer thereof; the bond, bill, or note to be admitted as evidence without the necessity of proving the handwriting of the assignor or indorser. And in *Sims vs. Hundley* a notary's certificate, held to be inadmissible as evidence under the principles of general law, was admitted upon the ground that, having been made competent by a statute of Mississippi, it was competent evidence in the Circuit Court of the United States sitting in that State.

We perceive nothing, in the other sections of the Revised Statutes to which attention is called, that modifies section 721, except that, by section 858, the courts of the United States, whatever may be the local law, must be guided by the rule that "no witness shall be excluded in any action on account of color, or in any civil action because he is a party to or interested in the issue tried;" and by the further rule, that, "in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other, as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court." "In all other respects," the section proceeds, "the laws of the State in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trials at common law, and in equity and admiralty." As to section 914, it is sufficient to say that it does not modify section 721 in so far as the latter makes it the duty of the courts of the United States, in trials at common law, to enforce—except where the laws of the United States otherwise provide—the rules of evidence prescribed by the laws of the States in which they sit.

For these reasons, it is clear that the circuit court properly refused to permit physicians called as witnesses to disclose information acquired by them while in professional attendance upon the insured, and which was necessary to enable them to act in that capacity.

2. The widow of the insured having been called as a witness on

behalf of the company, it is contended that the court erred in not allowing her to answer this question : "Did you not understand from your husband the nature of the disease ?" That question, it is claimed, called for information derived from the insured as to the nature of any disease under which he may have been suffering at a particular time prior to his application. If she was a competent witness, and if the statements of the insured to her were admissible upon the issue whether he had concealed any fact in his personal history or condition with which the company ought to have been made acquainted, or upon the issue whether he had made fair and true answers to the questions put to him, still the question did not call for his statements, but only as to what the witness understood from him as to the nature of his disease. Her statement of what she understood may not have been justified by what the insured actually said, and may have been nothing more than the unwarranted deduction of her own mind. The objection to the question was properly sustained.

8. This brings us to the consideration of questions more directly involving the merits of the case. The first of these relates to the refusal of the court to instruct the jury that if they "believe, on the evidence, that the insured ever had had affection of the liver before the presentation to the defendant of the application for insurance, the policy is void, and the defendant is entitled to a verdict." This instruction was refused, and the court, among other things, said to the jury, that disease implied a substantial attack of illness or a malady, which had some bearing on the general health of the insured, not a slight illness, or temporary derangement of the functions of some organ.

The defendant's request for instruction was properly denied, for the reason that it might have been construed as requiring a verdict for the company, upon its appearing simply that the insured, prior to his application, had experienced a slight, temporary affection of the liver, which had no tendency to shorten life, and all the symptoms of which had disappeared, leaving no trace whatever of injury to health. The insured was directed to answer Yes or No, as to whether he had ever had certain diseases, among which was included "affection of liver." It is difficult to define precisely what was meant by "affection of liver," as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand affection of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by it-

self, may include acute as well as chronic disease of the liver. He describes it as "a big bag to put many diseases in," and observes that it "would cover anything in the world the matter with the liver." It seems to the court, however, that the company, by its question, sought to know whether the liver had been so affected that its ordinary operations were seriously disturbed or its vital power materially weakened. It was not contemplated that the insured could recall, with such distinctness as to be able to answer categorically, every instance during his past life, or even during his manhood, of accidental disorder or ailment affecting the liver, which lasted only for a brief period, and was unattended by substantial injury or inconvenience, or prolonged suffering. Unless he had an affection of the liver that amounted to disease, that is, of a character so well defined and marked as to materially derange for a time the functions of that organ, the answer that he had never had the disease called affection of the liver was a "fair and true" one; for, such an answer involved neither fraud, misrepresentation, evasion nor concealment, and withheld no information as to his physical condition with which the company ought to have been made acquainted. The charge, upon this point, was in accordance with these views, and no error was committed to the prejudice of the company.

4. There was evidence before the jury tending to show that the insured visited Europe in 1874 under the advice of Dr. Baner, a physician, and that he was ill in 1875 as well as in the month of October, 1876. At the trial the defendant read in evidence, without objection, the proofs of loss received by it from the trust company. The proofs were made on forms supplied by the insurance company. Among them was a certificate from Dr. Baner, who attended the insured in his last illness. That certificate was made up of questions to and answers by the physician. One of the questions required him to state the remote cause of death; if from disease, to give the predisposing cause, the first appearance of its symptoms, its history, and the symptoms present during its progress. His answer was: "The fatal attack was preceded by severe and protracted mental work, and by several attacks of malarial fever, accompanied in each instance by considerable cerebral engorgement." He also stated, in the certificate, that the immediate cause of death was cerebral apoplexy; that he did not think the insured had any other disease, acute or chronic, or had ever had any injury or infirmity; and that there was nothing in his habits or mode of life, predisposing him to disease, except a tendency to overwork.

Several instructions were submitted by the company touching this part of the case. In the form asked they were refused. But such refusal would not constitute ground for reversing the judgment, if the propositions they involved, so far as correct, were embraced by the charge. The jury were instructed, upon the whole case, that the insured warranted the truth in all respects, of each answer, statement, representation and declaration contained in the application, which was a part of the policy ; that any inquiry as to their materiality, or his good faith, was removed by the agreement of the parties, from the consideration of the court or jury ; that the truth of each answer was an express condition to the existence of liability on the part of the company ; and that if the answers, or any of them, were, in fact, untrue, the contract was at an end, although the insured, in good faith, believed them to be true. Their attention was particularly called to the answer to the eighth question in the application, in which the insured—responding to the inquiry whether he had had any other illness, local disease, or personal injury—stated nothing more than that “he had colic for one day, October, 1877 ; no recurrence ; general health good ” The court said : “Illness is a word which may include, properly, an attack of a less grave and serious character than a disease ; an illness may be slight or severe ; in either case it is an illness.” Referring also to a question which required the insured to state any fact relating to his physical condition, personal or family history, or habits, not already disclosed, and with which the company ought to be made acquainted, the court—almost in the language of defendant’s eighth request—charged the jury that if they believed, on the evidence, “that the trip to Europe advised by Dr. Baner, the illness in 1875, or the illness in 1876, or the suffering of several attacks of malarial fever, accompanied by cerebral engorgement (if those attacks occurred, or either of them) were facts relating to the physical condition and personal history of the insured, of importance to the ascertainment of the condition of his health at the time of his application, the omission of those facts, or either of them, from the application, avoids the policy, and the defendant is entitled to recover.” After reviewing all the evidence, the court concluded its charge by instructing the jury that if they found affirmatively that the insured “did not answer one of these questions truly, then there is nothing more for you to do except to find for the defendant ; if you find affirmatively that he was guilty of concealment in his answer to the fifteenth question, then you will find for the defendant.”

We are of opinion that the charge—the most important parts of which we have quoted—was not one of which the company had any reason to complain; and the plaintiff having recovered a verdict, makes no objection to it.

In reference to that portion of the charge referring to the statements in the certificate of Dr. Baner, made part of the proofs of loss, the point is made that the court erroneously instructed the jury that they could not, upon that certificate—made without cross-examination and simply to inform the company of the death of the insured—find as an affirmative fact, that the malarial attacks therein referred to as the remote cause of death, existed.

Without determining whether this certificate, so far as it assumes to state the cause of the death of the insured, was required by the contract as a condition of the plaintiff's right to sue on the policy, or whether, under the circumstances of this case, it was proof of all the facts stated in it, it is sufficient to say that the objection that the court, in effect, discredited that certificate as *prima facie* evidence of the facts stated, cannot be entertained. No one of the requests for instructions submitted by defendant covers the precise point now made, nor was any exception taken at the time to that part of the charge which, it is claimed, refers to the certificate of the attending physician. The only exception taken by the defendant to the charge was "to the charge of the eighth proposition, as modified by the court and embraced in his general charge." The eighth proposition submitted by the defendant was given, in the words already quoted from the charge, with the modification that the jury were to determine on the evidence, whether the insured had had the before-mentioned attacks of malarial fever, accompanied by cerebral engorgement. That modification was entirely proper, since it was the province of the jury to determine the weight of the evidence. *Cushman vs. U. S. Life Ins. Co.*, 70 N. Y., 77. If the subsequent part of the charge, which is now referred to as discrediting Dr. Baner's certificate as evidence of the facts stated in it, was regarded at the trial as a modification of the defendant's eighth proposition, or as objectionable in itself, the exception taken should have been more specific. The attention of the court should have been called to the particular point by something more definite than the general exception taken. *Beckwith vs. Bean*, 98 U. S., 284; *Lincoln vs. Clafin*, 7 Wall., 132; *McNitt vs. Turner*, 16 ib., 362; *Beaver vs. Taylor*, 98 U. S., 46.

No error was committed in overruling the instructions asked by

the defendant, since whatever they contained that ought to have been approved, was embodied in the charge to the jury.

We find no error in the record of which this court can take cognizance, and the judgment must be

Affirmed. .

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COURT OF APPEALS OF NEW YORK.

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GERTRUDE B. MURRAY, *Appellant.*

vs.

NEW YORK LIFE INS. CO., *Respondent.\**

The insured was shot and killed while engaged in a violent and unjustifiable assault. It was claimed that the shooting was accidental and involuntary on the part of the party assaulted.

*Held*, That as the death was directly due to the assault, it was as much a death in violation of the law within the policy as would be that of a burglar killed by an accidental fall while prosecuting a burglary.

Where the finding of the jury can be justified from either of two interpretations of the evidence it cannot be impeached by showing that part adopted one interpretation and part another.

S. W. FULLERTON, *for Appellant.*

JOSEPH H. CHOATE, *for Respondent.*

ANDREWS, J.

The policies upon the life of Wisner Murray each contain a condition that if the assured "shall die in, or in consequence of, a duel, or of the violation of the laws of any nation, State or province," the policy shall be void. The assured died from a pistol shot from a pistol in the hands of one Berdell, upon whom the deceased and his brother

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\* Decision rendered Oct. 7, 1884.



had committed a violent assault, and the defense is based upon this condition in the policy. It is an undisputed fact that the brothers, acting in concert, planned the assault upon Berdell. They stationed themselves in the waiting-room of the station, awaiting his arrival, and when he entered the room, Spencer Murray seized him by the arms from behind, and held him while his brother, Wisner Murray, standing in front, beat him over the head and face with a rawhide, striking from ten to twenty blows, inflicting severe and painful wounds from which the blood flowed profusely, covering his face and clothing. The assault was a brutal one, and so far as appears, without provocation. Berdell testified that in the struggle to escape from Spencer Murray, his hand was involuntarily brought into contact with his hip pocket containing a pistol. He drew it from his pocket, and it appears that Wisner Murray seeing the pistol, started toward the lunch counter, keeping his face toward Berdell and calling on his brother to "hold him and not to let him shoot." Wisner Murray jumped over the lunch counter, and as he was passing through a door into another room, the pistol in the hands of Berdell was discharged, the ball hitting the assured in the forehead, causing his death.

Berdell, who was called as a witness by the defendant, testified in substance that the firing of the pistol was accidental and was caused by the sudden jerking of his arm by Spencer Murray, who was still holding him, and that he had no intention of firing at the deceased. It is established by the great preponderance of testimony that until after the pistol was fired, Berdell was in the grasp of Spencer Murray and was struggling to release himself.

Berdell also testified that the deceased, during the time he was retreating, had a pistol which he pointed at the witness as if aiming at him. He is confirmed as to the deceased having a pistol by another witness, and a pistol was found after the affray on the floor near where the deceased fell, a distance of about thirty feet from the place where Berdell was when the shot was fired. The witnesses differ as to the time which elapsed between the commencement of the affray and the firing of the pistol, the highest estimate given by any witness being thirty seconds.

It is not disputed that the assault made upon Berdell was a violation of law. But it is contended that as, according to the evidence of Berdell, the firing was accidental, and not intentional, and as it also appears that it happened after the assured had abandoned the combat, his death was not "in, or in consequence of, a

violation of law," and was not therefore a death excepted from the operation of the policy. The argument is that death under such circumstances, from an accidental shooting, cannot in a legal sense be attributed to the violation of law which preceded it, so as to bring it within the condition of the policy. There must, no doubt, be a relation between the act causing the death and the violation of law, to avoid the policy. In the case of *Bradley vs. Mutual Ins. Co.*, (45 N. Y., 422), involving the construction of a similar clause in a life policy, the court said, "it seems to be clear that a relation must exist between the violation of the law and the death, to make good the defense; that the death must have been caused by the violation of law."

It may be that the proviso in the policy was primarily intended to exempt the company from the hazard of a death from violence to which persons engaged in the execution of criminal acts are exposed, and especially where the unlawful or criminal act is such as is likely to be met by forcible resistance. It is plain that a homicide committed in self-defense would be a death within the condition; so also a death at the hands of justice in punishment for crime. The death in these cases would be the direct and legitimate result of the criminal act.

Another case a little further removed from the violation of law as its cause, would be one where a party assailed, in the heat of passion naturally engendered by the act of the assured, on the moment takes the life of the aggressor, although the provocation might not be a legal justification of the homicide. Such a death we conceive might be within the condition depending upon circumstances. If the violation of law in which the deceased was engaged, was trivial, although calculated to some extent to excite opposition or resistance, but the taking of life was a result which no reasonable man could have contemplated as likely to follow from the unlawful act, there would be no such relation between the act and the death that the former could be said to be the cause of the latter.

But if on the other hand, the party killed was engaged in committing a violent assault, the natural result of which would be to arouse the passions and excite the anger of the party assailed, and in the heat of passion he killed his assailant, the death would, we think, be the result of the unlawful act within the meaning of the policy, although the party causing it exceeded the bounds of lawful resistance.

As between the company and the assured his violation of la

ought justly to be treated as the cause of the death, because the deceased must be assumed to have known the danger he incurred, and that a party resisting an assault under such circumstances, and whose anger is naturally excited, does not mark with exactness the line which separates lawful defense from excessive and unjustifiable force.

We have so far had in view cases where the death of a person insured was the result of the intentional act of another, or of the law. But while it is probable, as we have said, that cases of this kind were primarily in the contemplation of the parties to the contract, the words of the condition are too broad to permit them to be confined to this narrow and rigid limitation. The proviso clearly exempts the company from all risks of life which attend the violation of law, which are the natural and reasonable concomitants of the transaction. Prize-fighting is prohibited by law and is attended with some danger. Suppose in such a friendly contest, by mishap one of the combatants strikes a blow which causes the death of the other. Would a death under such circumstances be a death in the violation of law within the policy, although there was no intention to kill? However this might be answered, we think it is clear that there may be a death in violation of law within the meaning of the policy, although not intentionally inflicted, and although it was not occasioned by the act of another. A burglar, who in consequence of a misstep or to escape detection, falls or jumps from the roof of a house which he is attempting to enter, and is killed, dies in violation of law as plainly as if he had been shot by the owner in defense of his dwelling. In the former as in the latter case, the death results from the criminal act, within the policy, as a natural and reasonable consequence, because although the immediate cause of the death was a fall, yet the exposure to the danger was encountered in the prosecution of the criminal purpose.

Another case may be stated, of which there may perhaps be more doubt. Suppose the assured in this case, instead of having been killed by the pistol, had in the struggle with Berdell ruptured a blood vessel, or, being predisposed to heart disease, it had been brought on by the excitement of the affray, and he had died from either of these causes in the midst of the struggle. Death from a rupture of a blood vessel, or from disease of the heart, occurring independently of any violation of law, would be covered by the policy. The company assumes the risks of death from these causes

under ordinary circumstances. But do they assume such risk when the immediate, exciting cause of the death is a struggle originating in a criminal assault in which the deceased was engaged at the time? To exempt the company, must the death result from some peculiar and special risk connected with the commission of crime? It seems to us not, and that it is sufficient to bring a case within the condition if there is such a relation between the act and the death that the latter would not have occurred at the time if the deceased had not been engaged in the violation of law.

In the case before us it is said that the shooting was accidental, and not voluntary or intentional, and consequently was not a death in or in consequence of a violation of law. What incidents would attend the assault by the Murrays could not be foreseen. They probably did not know that Berdell had a pistol, and, if they had known it, they could not have anticipated that it would be discharged in the manner stated by him. But they took the risk of his resistance to any extremity. They took the risk of any injury which might happen to them in consequence of his handling a deadly weapon, whether such injury was intentional or accidental. The case is to be considered under the actually existing circumstances of the assailants and assailed, and if the killing under these circumstances was not an unnatural result of the attack, the case is within the condition.

Assuming that Berdell's statement that the shooting was unintentional, was binding on the jury, and that the killing was accidental, yet the accident was the result of the struggle of Berdell to free himself from the grasp of Spencer Murray, and the jerking of his arm by the latter. The accident, so called, was caused by the assault, and the risk of injury from the discharge of the pistol was occasioned by the criminal act of the Murrays.

The claim that Wisner Murray had abandoned the combat before the firing of the pistol, if true, does not meet the difficulty. He was a party to the original encounter. The struggle with Spencer Murray was continuing when the pistol was fired. If the shot had killed Spencer Murray, and he had been the person insured, there could, we think, be no doubt. It killed his brother, who was unfortunately within its range, but at a time when it is said he was attempting to escape from the scene. But he was not relieved from responsibility for the act of his confederate in a crime jointly planned, who was continuing the assault; and the act of Spencer

Murray in jerking the arm of Berdell, causing the explosion, is as to the company the act of both.

We are of opinion, assuming as true to its full extent the statement made by Berdell that the defense was established. If, as there is some slight evidence to show Berdell fired the pistol after he had escaped from Spencer Murray, the case is not changed. At all events the jury upon that theory of the case might well have found, and could not justly have found otherwise, that it was fired by Berdell in the heat of passion and under circumstances which, if they did not fully justify him, made the firing and the consequent death a natural and reasonable consequence of the assault. Whether, therefore, the firing of the pistol was intentional or not, or whether Wisner Murray had or had not abandoned the combat, the jury upon the evidence, were justified in finding as they did by the general verdict, that the assured died in, or in consequence of a violation of law.

This conclusion answers the points made upon the exceptions to the charge.

In submitting the case to the jury the learned judge requested them specifically to answer three questions: 1st. Did Berdell fire the shot which killed Murray, intentionally? 2d. Was the killing of Murray justified on the ground that it was done by Berdell for his lawful self-defense? 3d. At the time Murray was shot, had he abandoned the combat? The judge at the time of submitting the questions, stated that he did not consider them necessary to a verdict, meaning thereby, as we infer, that an agreement of the jury in respect to them was not essential to a recovery. The jury returned a general verdict for the defendant, accompanied with the statement that they were unable to answer the questions submitted. The plaintiff's counsel objected to the reception of the verdict until the questions submitted were passed upon and determined by the jury, but the court overruled the objection.

We think the exception was not well taken. The case was one in which a special verdict was not required (Code, § 1,187). The point to be determined by the jury was whether the insured died in, or in consequence of a violation of law. The jury found for the defendant upon this issue, and as was said by Brown, J., in his very satisfactory opinion, "The jury might well have united in that conclusion, although some should think the shooting accidental, and others intentional, some that it was done in self-defense, others that it was done in the heat of passion, some that the assured had aban-

doned the combat, others that he had turned to renew the assault upon Berdell with his pistol."

It is not necessary that a jury in order to find a verdict should concur in a single view of the transaction disclosed by the evidence. If the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that a part of the jury proceeded upon one interpretation, and a part upon the other.

The case of *Ebersole vs. Northern Central Railroad Co.* (23 Hun, 114), is not in point. A finding that there was no contributory negligence was in that case an essential element in the plaintiff's right of action. The agreement of the jury upon that question must have preceded the finding of a lawful verdict.

We think the judgment should be affirmed.

All concur, except DANFORTH, J., absent.

## COURT OF APPEALS OF NEW YORK.

STEPHEN O. BARNUM *ET AL.*, *Respondents.*

vs.

MERCHANTS' FIRE INS. CO., *Appellant.\**

The policy contained conditions dividing the property into not-hazardous, hazardous, extra hazardous, and specially hazardous, firecrackers being denominated hazardous, Yankee notions extra hazardous, and fireworks specially hazardous. Above the specially hazardous list, it was stated the following merchandise to be covered must be specially written in the policy, under which was included fireworks. The policy also provided that if the property be used for storing or keeping any article more hazardous than called for by the original contract, except as provided for or agreed to in writing thereon, or if the risk shall be increased or the premises used for more hazardous purposes notice should be given and indorsed, or the policy should be void.

*Held*, That the policy was not violated by keeping of firecrackers in the stock of a store insured as a fancy goods and Yankee notions store.

*Held*, That evidence was admissible to show that such articles were usual in such a store.

*Held*, That it was too late after commencement of action to allege for the first time a defect in the proofs of loss regarding the notary.

*Held*, That where after service of summons the company delayed the action by propositions to arbitrate it cannot claim that suit was too late by reason of such delay.

S. S. ROGERS, *for Respondent.*

H. E. SICKELS, *for Appellant.*

DANFORTH, J.

The plaintiffs while doing business in Buffalo obtained from the defendant a policy of insurance in the sum of \$2,500, against loss or damage by fire, "on their store furniture and fixtures, contained in

\* Decision rendered Oct. 31, 1884.

a certain building in that city, to be occupied by the assured as a fancy goods and Yankee notion store."

The property was injured by fire on the 4th of June, 1879, and upon suit brought it was established that the liability of the defendants, if any, amounted to \$670.25, but the policy contained conditions dividing insurable property into "not hazardous," "hazardous," "extra hazardous" and "specially hazardous," and by which firecrackers in packages were denominated "hazardous," fancy goods "extra hazardous," Yankee notions "extra hazardous," and fireworks "specially hazardous," and above the class "specially hazardous" was printed "the following merchandise \* \* \* to be covered must be specially written in the policy," and then follows a list in which is found "fireworks." It was also therein declared "that in case the said property at any time shall be used for the purpose of carrying on therein any trade \* \* \* or for storing, using, or keeping therein any articles, goods or merchandise, or for more hazardous purposes than that called for by the original contract of insurance \* \* \* except as herein specially provided for or hereafter agreed to by this corporation in writing upon this policy," "or if during its existence the risk shall be increased \* \* \* by any means, or if by the occupation of the premises for more hazardous purposes than are permitted by this policy \* \* the insured shall give proper notice (in writing) and have the same indorsed in writing, and any failure to comply with these conditions will make this policy void."

In case of loss the assured was required, among other things, to "produce a certificate under the hand and seal of a magistrate or notary public most contiguous to the place of the fire and not concerned in the loss," stating certain particulars in relation thereto; and these provisions being complied with, it was further provided that no suit or action of any kind against the company for the recovery of any claim under the policy, shall be sustainable unless it "be commenced within the term of six months next after the day on which any loss or damage shall occur."

At the time of the fire, the plaintiffs had in the store from 650 to 700 boxes of firecrackers, and from \$200 to \$400 worth of fireworks consisting principally of roman candles, rockets and some small works like pin-wheels. All these articles were procured after the policy issued, and unless they are fairly to be considered as forming part of the stock of a fancy goods and Yankee notion store, no notice of an intention to keep them was given to the company,



nor its assent thereto in any manner obtained. To remove this difficulty the plaintiff's counsel, against the objection of defendant, proved that firecrackers and fireworks constitute an ordinary and usual and recognized portion of a stock of fancy goods and Yankee notion stores and were ordinarily kept in such stores at the time of the writing of the policy mentioned in the complaint.

In this there was no error. The policy was ambiguous. To ascertain whether the assured used the store in which the insured property was placed, for storing or keeping articles not permitted, or which would increase the risk, it was necessary to ascertain what articles were included in the term selected by the insurer, viz: a "fancy goods and Yankee notion store." The policy does not disclose it, and it is not perceived that it could be done except by proof as to the goods and merchandise usually kept in such stores. The provisions of the policy are ample to exclude by name prohibited articles from the risk, but they throw no light upon the question, what varieties of merchandise property belong to a store characterized as was the one in this case. Fireworks are mentioned as specially hazardous, and "to be covered, must be specially written in the policy." But here there was no insurance upon the stock, and the question presented, by that condition does not arise. The inquiry was merely to discover whether the questionable articles formed part of the business which might properly be carried on in the store where the insured property was placed. For that purpose it was admissible, not only within the well-settled general rule that in determining the meaning of a policy, regard must be had to the course of the trade to which it relates, but also within the cases in this court upon the precise point. *Pindar vs. Kings Co. Fire Ins. Co.*, 36 N. Y., 648; *Steinbach vs. Lafayette Fire Ins. Co.*, 54 N. Y., 90.

The evidence was sufficient to justify the referee's findings in accordance with it, even if it is considered—as the appellant's claim it should be—as relating only to the city of Buffalo and its vicinity. The subject of the insurance was at that place, and the underwriters knew, or ought to have known, the usage and course of business in connection with which the policy was issued, and must be assumed to have made their contract with reference to it. There was then no breach of any condition of the policy, and the plaintiff established a cause of action.

The appellant objects to its enforcement, however, upon the grounds, first, that although the plaintiff produced the certificate of

a notary public in due form, "he was not the notary referred to in the policy, because he was not the one most contiguous to the place of fire," and second, that the action was not commenced within the time specified in the policy. It appeared, however, that proofs of loss were given in due season, and objections upon various grounds made to their sufficiency. The notary in fact resided within four hundred feet of the fire, and no defect in this respect was pointed out until after the commencement of the action. It was then too late. *O'Neil vs. Buffalo Fire Ins. Co.*, 3 N. Y., 122.

As to the remaining point, the proofs of loss were furnished June 13, 1879, and then followed an active correspondence between the company and the insured and their attorneys, the former claiming that the proofs of loss should be amended in several particulars, and also deprecating a suit and proposing and urging an arbitration or reference of the claim of the assured, until by letter of the 24th of January, 1880, the insurers directed their attorneys to enter an appearance in this matter. It was done on the 26th of January, 1880, by service on the attorneys of the insured of notice of retainer, entitled "In the superior court," and demanding a copy of the complaint to be served on the attorneys for the insurers at their office. On the 28th of January the summons and complaint in this action (in the superior court of Buffalo) was served on the defendants' attorneys by mail. The defendants again sought to arbitrate, and requested and obtained from plaintiffs' attorneys, an extension of the time to answer to March 25th, and did in fact answer the complaint on the 24th of March.

As regards the defense setting up that the action was not commenced in time, the learned counsel for the appellant concedes that the time to bring the action did not expire until February 13, 1880. The referee found that it was in fact commenced on the 28th of January of that year. Upon the facts stated it can hardly be pretended that the application now sought to be made of the condition in question, is either "just or honest," and it is said that in such case only "should it be permitted to defeat a recovery." *The Mayor vs. Hamilton Fire Ins. Co.*, 39 N. Y., 45; *Hay vs. Star Fire Ins. Co.*, 77 N. Y., 235. Nor does it apply except where the proofs of loss were originally complete and received without objection: *Ames vs. N. Y. Union Ins. Co.*, 14 N. Y., 254; nor where the delay is occasioned by the demand of underwriters for other particulars. *The Mayor vs. Hamilton Fire Ins. Co.*, *supra*. *Ames vs. Union Fire Ins. Co.*, *supra*; *Hay vs. Star Fire Ins. Co.*, *supra*.

The defendants may by objecting to the proofs of loss impose upon the assured the duty of making them complete and removing if possible the dissatisfaction of the insurers, and if he chooses to do so the delay is mutual and the time of limitation necessarily extended. That was the case here. On the 6th of August, the defendants by letter requested the plaintiffs to amend their proofs of loss in various specified particulars, as to the origin of the fire, when it occurred, and whether there were at the time of the fire, or had been immediately preceding it, fireworks within the store in question, and inclosed blank proofs of loss to be filled up. Some information was given, but on the 15th of August the defendants replied that it was insufficient, and wanted fuller answers to the questions of the preceding letter. This was repeated on the 28th of August, and a compliance with the policy requested, and the defendants say, "we will accept nothing short of a full and complete proof of loss embracing the points propounded in letter of August 6th, 1879, and desire to make this request so plain that you cannot misunderstand it. The loss of time mentioned by you is attributable to yourselves only. Please read policy conditions and make satisfactory proofs of loss at once."

The complaints on the part of the defendants, and efforts on the part of the plaintiffs to comply with them, continued until December. These facts are undisputed. Each party therefore assented to the delay, and while the negotiation was in progress, the defendants could not be called upon to pay, and consequently the cause of action did not accrue. (See cases *supra*, and *Steen vs. Niagara Fire Ins. Co.* 89 N. Y., 315). But in any view of the case the action was in time. When the attorneys were authorized by the defendants to appear for them, no suit was pending, but there was a controversy or "a case" against it in favor of these plaintiffs. The insurance company anticipated the commencement of an action, and their attorneys gave a formal retainer. This could not bind the plaintiff to commence his action in the court named by them, but they were authorized to act for the defendants in such action as should be commenced, and service on them was made equivalent to service on the client. The process and complaint were served on the day named by the referee, and were retained by the defendants' attorneys as if in conformity with the demand, and the answer of the defendants was to the complaint thus served. It related to a state of things existing at the time of the service of that pleading, and that act of acquiescence was an admission that the parties answer-

ing had been brought into court, not that they went in uninvited. When the complaint was thus served, the time limited by the condition, however the facts are construed, had not expired, and if the defendants did not intend to receive it as in compliance with their demand, they should have returned it. We think no defense was established and that judgment properly went against them.

It should be affirmed.

"All concur (Earl, J., in result) except Rapallo, J., absent."

## SUPREME COURT OF TEXAS.

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Error from Bell County.

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FIRE INS. ASS'N (LIM.) OF LONDON }

vs.

MILLER BROS.\* }

An open policy is one in which the sum to be paid as an indemnity in case of loss is left open to be proved by the claimant in the case of loss, or to be determined by the parties.

Although the policy of insurance contains a provision that it shall not be assigned except by writing indorsed on the policy, yet if the agent of the company knew of an assignment not in accordance with such provision, and assented to it, the transfer will be held valid.

Where the judge trying the case without a jury finds his conclusions of law and fact, and places them in writing as a part of the record, and they conflict with the statement of facts signed by counsel and approved by the judge, the statement of facts will be considered as correct.

Where the policy contains a stipulation as a condition precedent to the insured's right of action for damages for loss, that a statement of the loss be furnished the insurer, and there is no proof that such statement was made, plaintiff cannot recover.

GEO. W. TYLER, *for Appellants in Error.*

HARRIS & SAUNDERS, *for Appellees in Error.*

WHITE, P. J.

On the twenty-fourth of March, 1883, J. Z. Miller and Amanda P. Miller, composing the firm of Miller Bros., bankers, in Belton, Texas, filed in the county court of Bell County their original petition against the Fire Insurance Association (Limited), of London, England, to recover from defendant \$1,000, the amount of a certain cer-

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\* Opinion filed October 18, 1884. From Texas Law Review.

tificate of insurance, issued on the twenty-third day of May, 1882, by the defendant through John L. Lee, local agent of the defendant at Balton, to Wm. Moore & Son, on a certain lot of plows, cultivators, etc., the property of said Wm. Moore & Son, said certificate of insurance having been issued under, and subject to the conditions of open fire policy No. 454,471, issued by defendant to John L. Lee, agent, on the eighteenth day of February, 1882, the property covered by said certificate having been destroyed by fire on the fifteenth day of November, 1882, and said property and certificate of insurance having been on the twenty-first day of September, 1882, sold and transferred by Wm. Moore & Son to Isaac B. Webb, and simultaneously sold and transferred by Webb to Miller Bros., plaintiffs, with the alleged consent and approbation of the defendant, through its local agent, the said John L. Lee. Plaintiffs, on July 16, 1883, filed their first amended original petition.

Defendant pleaded demurrers, general and special, which were overruled, and pleaded the general denial and set up the conditions of the open policy No. 454,471 against the transfer of the property or insurance without consent of defendant; that consent or waiver must be in writing, indorsed on the policy, etc.

The cause went to trial November 16, 1883, resulting, November 17, 1883, in judgment for plaintiffs for \$990, being the amount of the policy, less \$10 premium unpaid at date of fire, and for eight per cent interest on said \$990 from January 16, 1883, to date of judgment, the total judgment entered up being \$1,071.50. Defendant moved for a new trial, which was overruled, and now brings up the case on a writ of error, which was regularly perfected on March 14, 1884.

It is insisted that the court erred in overruling defendant's general and special exceptions to plaintiff's first amended original petition. These exceptions were to the sufficiency of the petition in its allegations with reference to the fact that the premium for the policy had been paid or secured by the insured; that if a waiver of payment was intended to be relied on, the acts, declarations, or matters constituting the waiver or estoppel were not alleged with sufficient certainty; and that the contract of insurance was not set forth with sufficient certainty as to date of its termination, rate of premium, etc. The rule of law relied upon in support of some of these exceptions is, that a contract of insurance is not binding unless the premium has been paid, or is secured, or unless the payment is waived. In this case the petition does allege that the payment of the premium was waived by the agent of the company, and sufficiently avers the

circumstances under which the waiver was made. The date when the contract of insurance took effect is also fully stated. The rate of the premium may not be stated in dollars but the petition states that the policy and certificate which fixed the rates with the original insurer, and the contract for which was in the hands of the defendant, had been transferred to the plaintiffs, and they agreed with the agent of defendant that thereafter they would pay the premium that the policy should be carried for, and in their own names. This, we think, supplied the necessity of averring the rate of premium to be paid. As to the termination of the policy, we cannot see how, under the circumstances of this case, this could be alleged with certainty, because the policy was an open policy.

An open policy is one in which the sum to be paid as indemnity in case of loss is left open to be proved by the claimant in the case of loss, or to be determined by the parties, and this determination is called the adjustment of the loss. May on Insurance, p. 27. If limited in duration the termination may happen at any time by loss from fire, and a loss from fire is a termination. So then it seems to us that it is immaterial whether the time it was to endure is alleged or not, if it is alleged that it was subsisting at the date of the loss by fire—which latter date is given. We are of the opinion that the court did not err in overruling defendant's exceptions to the petition.

It is claimed for error that the court found as a fact that the transfer or assignment of the certificate of insurance from Moore & Son to Webb, and from Webb to Miller Bros., was legal and valid. One of the conditions of the policy or certificate was that there should be no transfer of the policy or certificate unless the consent of the insurance company to such transfer or assignment was indorsed in writing on the certificate or policy.

There was no such indorsement in writing on the certificate or policy, but the evidence fully shows that the agent of the defendant knew of the transfer and assignment, and that he consented to it. A similar question arose in the case of Griffin & Shook vs. Crescent Insurance Co. (1 *Texas Law Review*, 326), and the court held that the company was bound and estopped by the acts of the agent.

One of the stipulations and conditions in the open policy in this case was that if a loss by fire occurred, that "a particular statement of the loss shall be rendered to the association (the defendant herein) as soon after the fire as possible, signed and sworn to by the assured, stating such knowledge and information as the assured has been able to obtain as to the time, origin and circumstances of the

fire, also stating the exact nature of the title and interest of the assured, and of all others, in the property therein described, all incumbrances thereon, and the cash value thereof, the amount of loss or damage; all other insurance, whether valid or not, covering any of said property, and a copy of the written parts of all policies; any changes in the title, use, occupation, location, possession or exposure of said property that may have occurred since the issuing of the policy; how, by whom, and for what purpose the building herein described, and the several parts thereof, were occupied at the time of the fire," etc.

This statement of loss and the other required facts was a condition precedent to plaintiff's right of action and recovery. We find no such proof of the fact that such a statement was rendered by plaintiffs to defendant in the statement of facts contained in the record before us. In the conclusions of fact found by the judge, however he states as a fact so found that "defendant received from plaintiffs due notice of said loss by fire." This fact thus found by the judge is not supported by the statement of facts as agreed to by the parties and approved by the judge as the evidence adduced on the trial. The question is as regards this discrepancy: By which shall this court be governed, the judge's conclusions or the statement of facts? It is true that such conclusions of the judge are required to be filed and become a part of the record in the case. Rev. Stats., art. 1333. Still, where an independent statement of facts is legally made and agreed to by counsel, approved by the court and made a part of the record, we are of opinion that it should be conclusive of the facts in a question as to its conclusiveness against the independent statement of the judge with regard to facts found by him.

The rendering of a statement of the loss to defendant by the plaintiffs was a condition precedent to any claim for damages, and a fortiori to any right of action by them. Proof of this important fact should never be in doubt, much less omitted from the statement of facts, if proven. Without such proof the judgment is not sustained by the evidence. We are constrained to hold that in this particular the plaintiff's case is not made out, and the finding of the judge and the judgment are, therefore, not sustained by the evidence.

Another error is that the judgment is excessive. This fact is admitted by the defendants in error, and they proposed to remit the excess. Such being the case, we would not have reversed the judgment upon this ground, but would have reformed it.



Because the judgment is not supported by the evidence, and because the court erred in overruling the motion for a new trial, the judgment is reversed and the cause remanded.

Reversed and remanded.

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## COURT OF APPEALS OF TEXAS.

*Appeal from Grayson County.*

NEW YORK LIFE INS. CO.

vs.

ROHRBOUGH, MOORE & CO. ET AL.\*

Before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe. It is well settled that persons against whom the defendant would have a right of action in case judgment go against him, may be made defendants on his application.

When an agent having authority makes a contract in behalf of his principal, it is binding upon the principal, although the principal has received no benefits from it.

It is a well-settled rule of law that the principal is bound by the act of his agent, done within the scope of his apparent authority, in dealing with innocent third persons, although such act may be in direct violation of private instructions.

For most practical purposes, a party dealing with an agent, who is acting within the apparent scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is the contract of the principal.

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\* From Texas Law Review.

It is a well-settled rule of law that, if a principal puts it in the power of his agent to make contracts, or to do acts, apparently within his authority, which will result in injury to innocent third persons, or to the principal, the law imposes the loss upon the latter.

C. N. BUCKLER, *for Appellant.*

WOODS, WILKINS & CUNNINGHAM, *for Appellees.*

WILLSON, J.

Rohrbough, Moore & Co., brought this suit against W. H. Stinson, as maker, and A. H. Coffin, as indorser of a note for \$261.40, executed by said Stinson to one J. Boon. Boon transferred the note before maturity to Coffin, and the latter indorsed it before maturity to Rohrbough, Moore & Co.

Stinson pleaded a failure of the consideration of the note. He alleged that he executed the note to Boon as the agent of the New York Life Insurance Company, for the amount of premium on a policy of life insurance which said agent undertook and promised should be issued and delivered by said company to said Stinson, and which said policy was not to restrict said Stinson's right to travel when and where he pleased; that said agent agreed to hold said note until said Stinson had received said policy, and in case said policy was not received, said note was to be of no effect, and was to be returned to said Stinson; that said Stinson had never received said policy from said company; that he had received from said company a policy which restricted his right to travel, and he refused to accept the same, and returned it immediately to the company; that said note was obtained from him by the fraudulent representations and promises of the said Boon, acting as agent for said company; and that said company and its co-defendant Coffin, and also the plaintiffs Rohrbough, Moore & Co., each and all, at the time of said fraud, had notice thereof, and confederated together to obtain said note, and thereby defraud him. He prayed that the said company be made a party to the suit, and that in the event the plaintiffs should recover judgment against him upon said note, that he recover judgment over against said company.

Said company was made a party to the suit, and answered by—1. A plea to the jurisdiction of the court, claiming that it was improperly made a party to the suit, it having no cause of action against defendant Stinson, and plaintiffs having no cause of action, against it, and it having no joint or common interest in the cause of action or question at issue between plaintiffs and defendant. 2. A general

demurrer. 3. A special exception, setting forth the same matter contained in the plea to the jurisdiction. 4. A general denial.

The plea to the jurisdiction and the demurrers were overruled, and upon trial of the case, judgment was rendered in favor of Rohrbough, Moore & Co. against Stinson and Coffin for the amount of the note sued on, interest and costs, and a like judgment in favor of Stinson against the company, and from which the company, after motion for new trial made by it and overruled, appeals to this court.

We will consider first, appellant's sixth assignment of error, which complains of the overruling of its plea to the jurisdiction and its demurrers.

It is provided by statute that, before a case is called for trial, additional parties may, when they are necessary or proper parties to the suit, be brought in by proper process, either by the plaintiff or the defendant, upon such terms as the court may prescribe, etc. [Rev. Stats., art. 1209.]

The question here is, "Is the appellant a proper party to this suit?" It is well settled that persons against whom the defendant would have a right of action in case judgment go against him, may be made defendants on his application. [Sales' Pl. & Prac., sec. 279.] We are of the opinion, that the matters alleged in Stinson's answer show a right of action in his favor against appellant. If the allegations of the answer be true, Stinson, upon being compelled to pay plaintiff the note sued upon, was entitled to recover of appellant the amount so paid. We think, therefore, that this assignment is not well taken.

Appellant's fifth assignment is, that the court erred in refusing to give the following requested instruction: "There being no allegation in Stinson's answer that the New York Life Insurance Co. received the benefits arising from the execution or negotiation of the note sued upon, you are instructed that you cannot render any judgment against the company."

If Boon was the agent of appellant, and had the apparent authority to make the contract alleged with Stinson, and as such agent did make it, and received Stinson's note, and the company failed to comply with the promise of the agent—which was the consideration of the note—the company would be liable to Stinson whether it had or had not reaped any of the fruits of the transaction. This requested instruction, in our opinion, was not the law of the case, and was properly refused.

Appellant's first assignment of error is, that the court erred in

overruling its motion for a new trial, because the verdict is not supported by the evidence, "because there was no evidence showing that Boon was the authorized agent of appellant, with authority to take notes in lieu of cash on premiums, or to enter into such contract or arrangement as is alleged in Stinson's answer, and because the evidence showed that Stinson relied on Boon individually, and on his obligation to get such a policy as he contracted for ; and because the evidence showed that Stinson knew that Boon was not authorized by the company to enter into such a contract so as to bind it.

It was proved that Boon was a general agent of the company ; that he had, prior to taking Stinson's note, taken and negotiated several other notes executed by other persons for premiums on policies, and that plaintiffs Rohrbough, Moore & Co. had purchased from said Boon and one Burk, who was also an agent of appellant, some twenty such notes. Boon and Burk together sold these notes to Coffin, who was at the time also an agent of the company. These premium notes, it seems, were discounted by Boon and Burk, and the money received thereon forwarded to the company along with the application for policies. The notes themselves never went into the possession of the company, but were used by agents to raise money upon, the company, however, receiving this money from the agents before issuing the policies. The agent of the company at St. Louis testified that he had appointed Boon and Burk agents for the company, to solicit policies and to receive premiums in cash, but that they had no authority to receive notes, or to negotiate notes, for premiums, and that the company had no knowledge that they were so doing, and had never ratified such acts.

Does this state of facts support the verdict of the jury, holding appellant responsible for the contract with its agent, Boon, with Stinson? We think it does. It is a well-settled rule of law that the principal is bound by the act of his agent, done within the scope of his apparent authority, in dealing with innocent third persons, although such act may be in direct violation of his private instructions. *Merriman vs. Fulton*, 29 Texas, 97. Indeed, for most practical purposes, a party dealing with an agent, who is acting within the apparent scope of his authority and employment, is to be considered as dealing with the principal himself. If it is a case of contract, it is the contract of principal. If the agent, at the time of the contract, makes any representation, declaration or admission touching the matter of the contract, it is treated as the representa-

tion, declaration of the principal himself. Story on Agency, sec. 135. It is also a well-settled rule of law, that if a principal puts it in the power of his agent to make contracts, or to do acts, apparently within his authority, which will result in injury to innocent third persons, or to the principal, the law imposes the loss upon the latter. 1 Wait's Ac. & Def., 286.

We have discussed all the assignments of error presented in the brief of appellant's counsel, and the other assignments not so presented are considered as waived.

We are of opinion, upon the whole case, that the judgment is just and in accordance with the law and the facts.

**Affirmed.**

## COURT OF APPEALS OF KENTUCKY.

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*Appeal from Scott Court Common Pleas.*

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STEVENSON

vs.

PHOENIX INS. CO.\* )

The policy on a dwelling provided that other insurance without consent should render it void. The insured subsequently took out another policy containing a similar provision without consent.

*Held*, That the second policy was not absolutely void, but only voidable at the option of the insured, and was a violation of the provision against other insurance in the first policy which defeated recovery.

W. S. DARNABY, *for Appellant.*

JAS. E. CANTRILL, JAS. F. ASKEW, LINCOLN, STEPHENS & SLATTERLY, *for Appellee.*

LEWIS, J.

This is an action by appellant to recover of appellee \$3,000, amount of a policy of insurance issued October 25, 1877, for one year on a dwelling-house destroyed by fire.

In the policy is contained the following condition: "If the assured shall have, or shall hereafter make any other insurance on the property hereby insured or any part thereof, without the consent of the company written hereon, \* \* \* then in every such case this policy shall be void."

In defense of the action it was alleged that on the same day, but

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\* Opinion filed Sept. 16, 1884.

after the policy was issued, the plaintiff, in violation of that condition, without the consent of the defendant written on the policy, procured from two other companies policies of insurance on the same property aggregating \$6,000, to continue in force during the same period.

In reply it was admitted that the plaintiff did procure other insurance on the property without the defendant's consent, as alleged in the answer, but it was stated that the defendant had notice thereof and waived its right, and was estopped to claim a forfeiture of the policy.

Upon the issue as to waiver made by the pleadings a verdict in favor of the plaintiff in the action for the amount sued for was rendered and judgment entered accordingly. But upon appeal to this court the judgment of the lower court was reversed and cause remanded for a new trial; it being held in the opinion rendered that there was no evidence offered which was proper to go to the jury on the question as to waiver of the forfeiture, and that the motion for nonsuit should have been sustained. *Phoenix Ins. Co. vs. Stevenson*, 78 Ky., 150.

Upon the return of the case the plaintiff in the action was permitted by the court to file two amended replies, in which it was, in substance, alleged that in each of the two policies procured by him after the one issued by the defendant, was contained a like condition as to previous and subsequent insurance of the same property by other companies; that those policies were issued to him without any notice to, or knowledge on the part of either the two companies issuing them of the prior insurance by the defendant until after the house insured was destroyed by fire; and that the two policies being thus rendered invalid by the plaintiff's breach of condition contained in them, there was in fact no violation by him of the condition contained in the policy sued on.

The case is now before this court upon appeal from the judgment sustaining a general demurrer to the amended replies and dismissing the petition.

The question presented by the amended replies has heretofore been passed upon by this court in the case of *Luggs vs. Liverpool & London & Globe Ins. Co.*, MS. opinion.

In that case the court in rendering the opinion used this language: "Appellant contends that the last insurance was absolutely void, and left the first in full force. He is wrong in any aspect of the case. First, the second insurance was not void, but voidable

only at the option of the insurer ; and second, if it were void ab initio that fact would not relieve appellant from the forfeiture resulting from a violation of the stipulations in the first policy against additional insurance."

It is thus obvious that if the opinion in that case is to be adhered to, the judgment sustaining the demurrer to the amended replies must be affirmed.

Counsel for appellant refers us to several authorities holding a doctrine opposite to that announced in the opinion referred to by this court, and perhaps the weight of authority in this country may sustain him. But on the other hand the decision of this court is supported not only by the Supreme Court of the United States and several State courts, but by principle and reason.

In the case of *Baer vs. Phoenix Ins. Co.*, 4 Bush, 242, where the question arose as to the proper construction to be given to a similar condition contained in a policy of fire insurance, this court said : "The object of that condition was to assure the underwriter against over-insurance, or insurance equivalent to the entire risk, whereby the insured, relieved of all risk, might be tempted to procure the loss, or to take no care to prevent it. To make it the interest of the insured as well as the insurer to avoid loss, no prudent underwriter ever insures for the full value of the property, but leaves the owner so far interested in preventing the loss as to assure his fidelity and vigilance in proper care to avoid it."

This precaution on the part of insurance companies is not only justifiable, but indispensable to their success, if not existence. For without such provision against cumulative insurance, fraud and bad faith on the part of the insured would be encouraged, and the legitimate and useful purposes of fire and marine insurance to a great extent defeated.

A contract of insurance, like any other which the law sanctions, should be enforced by the courts according to its terms and conditions. In this case a plain and vital stipulation which the insurer had the right to insert in the policy, and which the assured, understanding or having the opportunity to understand, agreed to, has been deliberately violated by the latter. And he now seeks to avoid the forfeiture which results from such violation, and is now claimed by the insurer, upon the ground that the two subsequent policies being rendered invalid by like breach of contract and of faith on his part, the first one is now valid and enforceable by either party to it.

But it has been held by this court in the two cases of *Baer vs*



Phoenix Ins. Co., and Luggs vs. Liverpool & London & Globe Ins. Co., that a violation by the assured of such a condition in a policy of insurance does not render the policy absolutely void, but simply voidable, to be treated as void by the insurer at his own exclusive option.

The correctness of this ruling is in our opinion so manifest that it is needless to enter into an extended discussion to support it. For to hold a contract of insurance that has been violated by only one of the parties to it void, or in the language of the pleadings invalid as to both, is to put it, after making the contract, in the power of either party to render it a nullity, by simply violating some one of its conditions.

The two policies referred to in the replies, which were obtained subsequent to that issued by appellee, should not, therefore, be held as void or invalid, but only voidable at the option of the companies issuing them. How they have been treated by the parties, the record of this case does not show, nor is it material. For they were procured by appellant either with the intention to defraud appellee, or in ignorance of the fact that in obtaining them he was violating his first contract, and incurring a forfeiture of his first policy. And in either case we are forced to conclude he intended to avail himself of cumulative insurance, and therefore was exposed to the temptation to bring about the loss of his property, or at least was rendered less careful to prevent its destruction.

The object of the condition mentioned was thus defeated by the conduct of appellant, and the risk of appellee increased without its knowledge or consent.

When a contract is plain, unambiguous and fair, not vitiated by fraud nor mistake in its execution, the courts are not authorized to make for the parties to it a different one, or to construe it contrary to its express terms, especially when the consequence may be to enable one of the parties to profit by his wrongful violation of it.

The judgment is affirmed.

SUPREME COURT OF NORTH CAROLINA.

OCTOBER TERM, 1884.

NORTH CAROLINA STATE LIFE INS. CO. )

vs.

OWEN WILLIAMS.\* )

The contract between a life company and its agent stipulated for a commission of twenty-five per cent on all first premiums and five per cent for renewals. No time was fixed during which the contract was to run. The company assigned its business to another company and renewals on two of the policies procured by the agent were effected through an agent of the assignee.

*Held*, That the contract was terminable at the election of either party and the agent was not entitled to renewal commissions except they were effected through him, there was no implied contract that he should be entitled to renewal commissions on policies which he had procured.

SMITH, C. J.

The defendant was constituted and licensed an agent of the plaintiff company in the prosecution of its business of life insurance under and by virtue of a contract mutually entered into and in these words:—

“Memorandum of an agreement between the North Carolina State Life Insurance Company of the one part, and Owen Williams, of Edgecombe County, N. C., of the other part, witnesseth: That the said company has appointed the said Williams its agent at Tarboro, N. C., for the purpose of soliciting applications for life insurance upon the terms and conditions following, to wit: That upon premiums received for all kinds of policies except endowment policies

\* Reported by John W. Hinesdale, of the Raleigh, N. C., Bar.

of less than twenty years, the said Williams shall receive a commission of twenty-five per cent on first year's payment and five per cent on renewals ; and that upon endowment policies of less than twenty years he shall receive a commission of fifteen per cent on first year payments and five per cent on renewals ; that it shall be the duty of said Williams on the first day of each and every month to make to said company a detailed report of his doings as agent, and to pay over all moneys that may come into his hands rightfully belonging to said company.

"In witness whereof the parties named hereunto set their hands this 12th April, 1873.

"For the company, O. H. PERRY, Supervising Agent.

"OWEN WILLIAMS, Agent."

In pursuance of the agreement and the exercise of his agency the defendant collected and had in his hands previous to the bringing of the suit of the funds belonging to the plaintiff the sum of \$109.85 not contested, which he refuses to pay, setting up as a defense a counter claim for a larger amount alleged to be due as damages under the provisions of the contract.

The plaintiff company unable successfully to conduct its business sold out and assigned many policies secured through the active efforts of the defendant, to another life insurance association which assumed its responsibilities, and undertook to carry out the arrangements and contracts between the assured, and the assignor insuring company in life insurance as the latter had undertaken.

Since the transfer and the discontinuance of the functions of the plaintiff, renewals have been effected upon two of the said policies through another agency employed by the assignee, the commissions on which at the rate specified in the agreement exceed the plaintiff's demand, and for this excess the defendant claims to be entitled to judgment.

Upon the hearing on the appeal in the superior court, judgment was recovered by the plaintiff, and for the amount of the claim the defendant appeals.

The only question presented is in reference to the construction of the contract of agency, and the rights of the defendant thereunder.

The entire structure of the agreement for the creation of the agency, while silent as to its duration, evidently contemplates a continued connection between the service to be rendered and the compensation provided therefor, and is terminable at the election of

either party. It may be put an end to by the principal, Story on Agency, sec. 463 ; by the renunciation of the agent, sec. 478; by operation of law when an incapacity in either party to maintain the relation is brought about, sec. 481.

The exception to the rule is when the agency is associated with an interest, and there it is not revocable by the principal to the detriment of the agent. What such an agency is, is thus explained by Chief Justice Marshall in the opinion in *Hunt vs. Rausmonier*, 8 Wheat., 174, cited in brief of plaintiff's counsel : " We hold it to be that, says the court, the interest which can protect a power after the death of a person who creates it, must be an interest in the thing itself. In other words the power must be engrafted on an estate in the thing. The words themselves seem to impart this meaning. A power coupled with an interest is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word interest, an interest in that which is to be produced by the exercise of the power, then they are never united.

Tested by the rule thus laid down, it is manifest that when the authority to insure ceases, the capacity of the agent ends also, and the relation of the parties terminates. Accepting this, the defendant claims compensation in damages for the withdrawal of the power to continue to act in the renewals, and measures his loss by the sum he would have received as commissions had he been permitted to act in two renewals made since the transfer.

This consideration involves the assumption that the contract confers an absolute and permanent right to proceed with renewals when the original insurance was effected through the efforts and instrumentality of the defendant, when he can no longer act as agent in making the renewals.

Such is not the fair interpretation of the terms of the contract, which allows the specified commission as compensation for services to the company in the renewals, and necessarily ceases when the services cease.

The right to compensation is associated with a continuance of services, and the compensation is the agreed measure of their value.

When the policy first issues the percentum specified becomes due, and for each renewal the reduced percentum is allowed. Very manifestly, the scope of the agreement conferring the authority is to provide the measure of remuneration for what the agent may do while he remains such, and no further. He was not to be paid for

renewals afterwards made, unless participated in by him while in possession of authority to renew. Although renewals are the consequence of the original contract of insurance, and in this particular, beneficial to the company, yet the full compensation given and accepted for this service is the twenty-five per centum on the sum received, provided in the contract, which creates the agency and regulates its terms. This is in our opinion a fair and reasonable interpretation of the instrument, and the result is adverse to the counter-claim.

It must be declared there is no error in the ruling, and the judgment must be affirmed.

## U. S. CIRCUIT COURT OF MISSOURI

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*Circuit Court, E. D., of Missouri.*

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WATSON

vs.

CENTENNIAL MUT. LIFE ASS'N.\*

A and B lived together as husband and wife, and recognized each other as such in their intercourse with friends for ten years, though no marriage ceremony had been performed. A provided for both, and B, like a wife, kept house for him; but in taking out a policy of insurance on his life for B's benefit, A had her name inserted as Mrs. B instead of Mrs. A. In an action by B on the policy, *Held*, That B was A's wife, and had an insurable interest in his life.

Where, after discovering that an assured has made misrepresentations to it in his application for a policy, an insurance company continues to collect assessments, it thereby waives any right it may have to declare the policy obtained by such misrepresentations invalid.

BREWER, J.

Two defenses are interposed in this case: First, that the complainant was not the wife of the insured, and had no insurable interest, and, second, that in the application for the policy the insured represented himself as a steamboat man, whereas, as a matter of fact he was a gambler by profession.

In reference to the first question, the testimony indisputably shows that for ten years prior to the death of the insured, he and the complainant lived together as husband and wife. There was no ceremony at the institution of that relation, but they lived together as husband and wife continuously during those years in the same home, recog-

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\* Decision rendered September 24, 1884.

nized as such by each other and by all in whose society they lived, he providing as husband for her and she taking care of the household duties, both visiting her friends and being introduced, when with them or traveling, as husband and wife. While in that relation he took out an insurance in her name as Mrs. Nellie Brooks. The mere name cannot change the fact of the mutual relations of the parties. The fact that no ceremony took place at the time the relation was entered upon does not prevent them, under the decisions of this court, as well as the supreme court of the State, from being adjudged as husband and wife ; and, being in such a relation, she had an insurable interest, and can maintain this action.

As far as the other defense is concerned, that he was a gambler instead of a steamboat man, the facts are that he had been a steamboat man, but perhaps, during the last few years prior to his death, had ceased to go up and down the river. But that fact was known to the company at least as early as May 24, 1883. After that it sent its notices for assessment, which were directed to him and paid by her, and thus the knowledge of the fact, even if a material fact, and such as to vitiate the policy, having been brought home to the company, any objection on that account was waived by it. Indeed, it is questionable whether, under the statutes of the State of Missouri, referred to by counsel in his brief, that otherwise would constitute any defense, because it does not appear that it was material to the risk, and no tender of moneys received on account of the policy was made by answer or on the trial. The decree, therefore, will go for the complainant as prayed.

## FOREIGN CASE.

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### SUICIDE.—MARSHALING OF SECURITIES.

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*English Chancery Division.*

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CITY BANK

vs.

SOVEREIGN LIFE ASSURANCE CO.

A policy of assurance contained a condition that if the assured should die by his own hand, the policy should become void, and all moneys paid in respect thereof should be forfeited to the company. But in case the beneficial interest in the policy had been vested in any other person for a valuable and pecuniary consideration, the policy should remain valid to the extent of the interest of such person, subject to a specified notice in writing having been given of the transaction transferring the interest.

The assured deposited the policy with the plaintiffs, to secure a debt owing from his firm, and further advances, the deposit being accompanied by a memorandum stating that the policy was deposited by way of equitable mortgage as collateral security.

The required notice was given to the assurante company, and S. subsequently committed suicide, the plaintiffs holding at the time of his death other securities for the debt besides the policy.

*Held*, That the suicide clause was undistinguishable from that which was under decision in *Solicitors and General Life Assurance Co. vs. Lamb*, that the plaintiffs were entitled to be paid out of the policy moneys, the amount of the debt due to them at the date of the death of S.

*Held*, further, that, notwithstanding that the estate the assured might there by be benefited, the assurance company were not entitled to have the debt paid, either primarily or ratably, out of the other securities held by the plaintiffs.

By this action the plaintiffs claimed payment by the defendants of the amount expressed to be secured by a policy of assurance upon the life of L. F. W. Schafer.



The policy was granted on the 10th December, 1866, for the amount of £4,000, and contained the proviso that if Schafer, the grantee and assured, should duly pay the annual premium during his life, the funds and other property of the company should be subject and liable, according to the provisions of the company's deed of settlement, to pay to Schafer's executors, administrators, or assigns, within three calendar months after satisfactory proof of his death should have been received at the office of the company, the sum of £4,000, and such further sum or sums as should under the regulations of the company be appropriated as a bonus or bonuses or an addition or additions to the policy.

There were certain conditions indorsed upon the policy, and to which it was expressed to be subject, and one of the conditions was in the following terms :—

A policy effected, either separately or jointly with other lives, upon the life of any person who shall die by his own hands or act, whether such act be felonious or otherwise, or shall die by duelling, or by the hands of justice, shall become void, and all moneys paid in respect thereof shall be forfeited to the company. But in case the beneficial interest in the policy has been vested in any other person, either originally or by such person having taken a legal or equitable assignment thereof, or charge or lien thereon, for a valuable and pecuniary consideration, the policy shall remain valid to the extent of the interest of such other party, provided that notice in writing of such assignment, charge or lien shall have been delivered at the office of the company thirty days before the death of the party on whose life the assurance was effected.

In July, 1878, the plaintiffs advanced a sum of £700 to Schafer's firm of P. & F. Schafer, and on the 29th of that month the policy was deposited with the plaintiff, to secure that amount and interest, and further advances together with a memorandum signed by Schafer, which stated that the policy was deposited by way of equitable mortgage as collateral security for the repayment of the £700 with interest and of further advances which should be made by the plaintiffs to P. and F. Schafer.

On the 1st August, 1878, the plaintiffs gave notice in writing of the fact and purpose of the deposit to the defendants, and Schafer executed to the plaintiffs an assignment of the policy.

Schafer subsequently became of unsound mind, and on the 8th March, 1882, died by his own hand.

On the 22d March, 1882, the plaintiffs gave notice of his death to

the defendants, and claimed payment of the moneys due under the policy ; their case being that, from the time of the original deposit, there had always been due to them upon the equitable deposit more than the total amount payable. By their action they claimed payment of the £4,000 and a further sum of £153 18s., a bonus payable on the policy, and interest, and if necessary an account of what was due upon their security, and payment by the defendants to them of the amount due, under the policy, toward satisfaction of the amount to be ascertained upon taking the account.

The defendants' case was that, inasmuch as the plaintiffs held the policy only as collateral security, together with other securities for P. and F. Schafer's debt, the plaintiffs ought to resort in the first instance to any primary securities given by Schafer or P. and F. Schafer ; or that, if that were not so, then the debt secured by the memorandum of deposit and the assignment of the policy, was payable ratably out of the policy moneys and the proceeds of the other securities given to the plaintiffs by Schafer or his said firm.

H. A. GIFFARD, Q. C., and BYRNE, *for Plaintiffs.*

The policy is valid in the hands of the plaintiffs to the extent of the debt due to them at the death. *White vs. British Empire Mutual Life Assurance Co.*, 19 L. T. Rep., N. S., 406 ; L. Rep., 7 Eq., 394.

The case is covered by authority. *Solicitors and General Life Assurance Co. vs. Lamb*, 10 L. T. Rep., N. S., 160, 792 ; 1 H. & M., 716 ; 2 De G. J. & S., 251.

They also referred to *Cooke vs. Black*, 1 Hare, 390.

COOKSON, Q. C., and LEMOX, *for Defendants.*

The case is distinguishable from the case of *Solicitors and General Life Assurance Co. vs. Lamb*, *ubi sup.* The terms of the policy in that case were not the same as here. The policy was not made void in that case if the exception operated. The debt is to be taken as payable not at the death, but at the end of three months afterward, namely, when the policy moneys were payable.

MEYBICK, *for the widow, the surviving partner, and the trustee in the liquidation of the assured.*

PEARSON, J.

I will not trouble you, Mr. Giffard, to reply in this case. I desire to say that I consider the case now before me as being covered con-

clusively by the judgment of Wood, V. C., in the court of appeal, consisting of Knight, Bruce and Turner, L. JJ., in that which has been cited to me and which I call Lamb's case, *Solicitors and General Life Assurance Co. vs. Lamb*, ubi sup. If I had any doubt whatever as to the decision in that case I should nevertheless consider myself bound by the decision, even if those doubts remained in my own mind; and if they did remain in my own mind, finding that three judges, Wood, V. C., and Knight Bruce and Turner, L. JJ., have come without hesitation to an opinion adverse to those doubts, I should conclude that I was wrong, and that it was my infirmity which prevented me from seeing the propriety and accuracy of those decisions. I simply decide this case because I conceive it to be already decided by authority which is binding upon me. Now, Mr. Schafer was minded to insure his life, and did insure it, by a policy in the Sovereign Life Assurance Company, and that policy contained this clause, which I will read shortly: "The policy effected upon the life of any person who shall die by his own hands shall become void, and all moneys in respect thereof shall be forfeited to the company; but in case the beneficial interest in the policy has been vested in any other person, either originally or by such person having taken a legal or equitable assignment thereof for a valuable pecuniary consideration, the policy shall remain valid to the extent of the interest of such other party, provided that notice in writing of such assignment, charge, or lien, shall have been delivered at the office of the company thirty days before the death of the party on whose life the policy was effected." The policy in this case was for £4,000, with bonuses. The policy having been effected in the year 1866, in the year 1878 Mr. Schafer deposited that policy with the City Bank, as a security, taking it shortly upon his current account. Afterward, and under circumstances which render his attempt on his own life explainable, Mr. Schafer committed suicide; and I assume that at the time of his death there was either the full amount of the value of the policy at that time, or something like the full amount—because that is at the present moment more or less in dispute—due on Mr. Schafer's account to the bank. They held at that time as a security for the debts so due to them, not only the policy, but other securities also. I do not know what those other securities were, but I assume they were at all events sufficient to reduce the amount due upon the policy very considerably, if those securities are to be either considered primary securities for the debt or were to contribute ratably to the debt. The question which is raised before me

is, whether those securities ought to contribute primarily or ratably toward the payment of the debt due to the City Bank, so as to release either wholly or pro tanto the policy moneys. Now, it seems to me that that is the exact case, under the same circumstances, that was before the court in Lamb's case, *ubi sup.*, and the point which the vice-chancellor and the court of appeals decided adversely to the insurance office. They decided that, although the assured's estate would, in effect, benefit by making the insurance money contribute the full amount to the payment of the debt, nevertheless the estate of the assured was entitled to that benefit. It is said that there is a difference between the terms of the policy in that case and the terms of the policy in this case, and that that distinguishes the two cases, and the decision in the one is no authority for the decision to which I ought to come in the present case. The terms of the clause in that case were these: "That if any person who has assured his own life shall die by his own act, this policy shall become void, except to the extent of an interest acquired therein by an actual assignment by deed, for valuable consideration, or as security or indemnity, or by virtue of any legal or equitable lien as security for money, upon satisfactory proof to the board of directors of the existence and extent of such interest. Mr. Cookson has argued before me that, whereas in this case that sentence is put in by way of exception, and there is a distinct clause beginning with the word "but," there is all the difference in the world between the two cases. In that case, he says, the policy is not made void if the exception comes into force. To my mind, with all deference to him, that argument is not sustainable. If I read this clause as I ought to read it in full, immediately after the word "except" I must put in these words, "except that the policy shall not be void, or except that the policy shall be valid to the extent of any interest." I find those are the same words as in this, with the single exception that, instead of the word "except," I have the word "but"; the words are "but the policy shall remain valid to the extent of the interest of such other party." Under these circumstances I think I should be doing worse than splitting hairs if I were to come to the conclusion that there was any such real difference between the two cases. I must therefore follow the decision in Lamb's case, and must determine that this policy is not to be reduced, either by forcing the sale of the other securities and applying them in the first instance, or by directing the other securities to come in and contribute ratably, so as to relieve the policy moneys pro tanto. It is not

necessary for me to give my reasons for the decision, beyond the simple fact that I consider myself bound entirely by the decision of Wood, V. C., and the appeal court. The only other question I have to determine is, whether, in considering what is due to the bank, I am bound to take the date of the death of the assured, or whether I am to take three months after that date. Mr. Cookson argues that, inasmuch as the policy moneys were only payable at the end of three months after proof of the death, that is the time at which the debt due to the bank is to be taken, the result of which would be that, in the first place, if the other securities happen to be bills and the bills run off during the three months, Mr. Cookson would say, you have now been paid, and therefore there is nothing due in respect to the policy. If I were to come to that conclusion, I should be deciding that immediately after the death of the assured the mortgagee holding that policy of assurance was hampered and could not realize the securities or do anything whatever, and the result would be that for three months it would not be known whether or not they had any security upon this. It seems to me that that would be to go in the teeth of the decisions, which say that the object of this clause is to give a marketable value to the policy; and in fact, it goes almost further than that—to say that the object was to benefit the assured himself, notwithstanding he committed suicide, to the extent, at all events, to which he had dealt with the policy. I come, therefore, to the conclusion that the time at which the account must be taken is the death of the assured, and if Mr. Cookson presses for an account, it must be taken.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### ACTION.

§ 19. **LIFE.**—*Where Maintainable.*—Suits against a corporation, foreign or domestic, may be maintained when in its nature the cause of action is transitory, founded upon a matter or transaction which might have taken place anywhere, in any county in which the company transacts business by agents, without regard to its proprietorship of real estate, or its principal place of doing business.

*Mobile Life Ins. Co. vs. Pruett.*

Rep'd Jour'l, p. 130.

ALA. S. C.

### AGENT.

§ 20. **LIFE.**—*Representations of Officers as to Proofs.*—Where it was claimed that a letter of the secretary and treasurer admitting satisfaction of the company as to proofs did not bind it; *Held*, That representations as well as acts of an agent within his authority are binding on the principal.

*Common States Life Ins. Co. vs. Edwards.*

Rep'd Jour'l, p. 115.

## APPLICATION.

§ 21. LIFE.—*Waiver of Misstatement as to Age.—What Constitutes Sound Health.—Subsequent Condition of Health.*—Where the secretary had in his hands evidence of a misstatement as to age which it was his duty to examine, the company cannot get up such misstatement to defeat a claim. The company may waive a restriction in the by-laws as to age where there is nothing against it in the charter. A representation of "sound health" in the application does not require absolute freedom from all bodily infirmities or tendencies to disease. Where the condition of health was satisfactorily established at the time of insuring, its subsequent condition was immaterial.

*Morrison vs. Wisconsin Odd Fellows' Mut. Life Ins. Co.*

Rep'c Jour'l, p. 145.

WIS. S. C.

## ARBITRATION.

§ 22. FIRE.—*Effect of Agreement on Jurisdiction of Courts.—Where a Condition Precedent to an Action.*—A general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators, will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they think fit to liquidate damages, in their own nature unliquidated, and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it. A policy of fire insurance was made subject to all the conditions and stipulations indorsed thereon, one of which was "that in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men \* \* \* whose award shall be conclusive and binding on both parties;" *Held*, That the submission to arbitration or a fair effort on the part of the insured to obtain it, was a condition precedent to his right to bring an action to recover his loss, where the amount thereof was in dispute between him and the insurer.

*Elliott vs. Royal Exchange Ins. Co.*, 2 Exch. L. R., 241; *Scott vs. Av-*

ery, 5 H. L. Cas., 811 ; Horton vs. Sayer, 4 H. & U., 643 ; Holmes vs. Richet, 56 Cal., 807.

*Old Saucelito Land & Dry Dock Co. vs. Com. U. Ins. Co.*

Rep'd Jour'l, p. 135.

CAL. S. C.

#### ARSON.

§ 23. FIRE.—*May be Joined with Refusal to Submit to Examination as a Defense.*—A stipulation in a policy of insurance that "the assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto, when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claims under the policy," is valid. A defense that the fire by which the insured property was destroyed was of an incendiary character and plaintiff implicated therein, may be joined in the answer with a defense that the policy contained a condition that plaintiff should submit to an examination under oath, and that such examination had been demanded and refused ; and where the jury, in answer to special questions, find that plaintiff has refused to submit to such examination when demanded, and plaintiff has not moved to compel defendant to elect as to which defense it will rely upon, judgment may be entered in favor of the defendant notwithstanding a general verdict against it.

Conway vs. Wharton, 13 Minn., 160 ; Shedd vs. Augustine, 14 Kan., 282 ; Mueller vs. Insurance Co., 45 Mo., 81 ; Dewees vs. Insurance Co., 34 N. J., Law, 244.

*Gross vs. St. Paul F. & M. Ins. Co.*

Rep'd Jour'l, p. 158.

MINN. U. S. S. C.

#### ASSIGNMENT.

§ 24. LIFE.—*In Case of Benevolent Society.—Effect of Reserved Power to Alter Beneficiary on Evidence of Insured as to Non-payment.—Construction of Regulations of Benevolent Societies.*—It was claimed by defendant that the insured had failed to pay an assessment and was not therefore in good standing. The plaintiff beneficiary insisted that the notice of assessment had not been received. An offer of evidence of admission by the insured that he had received the notice and had failed to pay, was refused on the ground that it was not admissible to abridge



the right of the beneficiary already acquired. *Held*, That the reserved power of the insured to alter the beneficiary, which was not exercised, did not take the case out of the well-established rule that such evidence is inadmissible against the acquired rights of third parties.

The *M. F. Life Ins. Co. vs. Applegate*, 7 Ohio St., 292; *Southern Life Ins. Co. vs. Booker*, 9 Heisk., 606; *Washington Life Ins. Co. vs. Haney*, 10 Kansas, 525; *Ranks vs. Am. Mut. Life Ins. Co.*, 27 N. Y., 282; *Mulliner vs. Guardian Mut. Life Ins. Co.*, 1 Thompson and Cook (N. Y. S. C. R.), 448; 2 Phillips on Insurance, 626, sections 2,058, 2,059, 2,069; *Pence vs. Makepeace*, 65 Ind., 345; *Wilburn vs. Wilburn*, 83 Ind., 55; *Harley vs. Heist*, 86 Ind., 196; distinguishing *Durlan vs. Central Verein*, 7 Daly, 168; *Richmond vs. Johnson*, 28 Minn., 447; *Swifts vs. R. P. and F. C. Benefit Association*, 96 Ill., 309; *Ballou vs. Gile*, 50 Wis., 614; *Hutson vs. Merrifield*, 51 Ind., 24.

*Held*, That the alleged admission being in connection with an application for re-instatement, was not a part of the *res gestæ*. Regulations of mutual benefit societies must be construed liberally to effect the objects of their organization.

*Ballou vs. Gile*, *supra*; *Edmans vs. Mut. Ins. Co. of the Order of Herman's Sons of Wisconsin*, 44 Wisconsin, 376.

*Supreme Lodge vs. Schmidt*.

Rep'd Jour'l, p. 123.

IND. S. C.

## BENEVOLENT SOCIETY.

§ 25. *LIFE.—Objection to Evidence.—Construction of Contract.—Application when Part of Contract.—Construction of Certificate.—Parol Evidence.*—Objections to evidence or questions propounded, which might have been obviated, must be specifically made on the trial, or they cannot be urged on appeal or error.

In seeking the intention of the parties to a written contract, the courts are not authorized to construe the words used otherwise than in accordance with their plain, natural, and obvious meaning, unless from a consideration of the entire evidence it shall appear that the parties did not intend to so use them.

An application by a member of a temperance order for a beneficiary certificate in the nature of a life insurance policy, con-

tained this clause, "I further agree, that should I at any time violate my pledge of total abstinence, or be suspended, or expelled for a violation of any of the laws of the order, or for non-payment of dues, etc., then all rights which either myself, the person or persons named in certificate, my heirs, etc., may have upon the beneficiary fund of the order, shall be forfeited."

*Held.* That the application was a part of the contract of insurance and obligatory upon the beneficiary named in the certificate, to whom payment was promised on the death of the member, and that the language was in the alternative, making either or any one of the causes named a forfeiture of all right of recovery upon the certificate.

A beneficiary certificate given to a member of an order witnessed that the member was entitled to certain rights and privileges of the order, and the same was issued upon the express condition that he should, while a member of the order, faithfully maintain his pledge of total abstinence, and comply with all the laws, rules, regulations and requirements of the order, otherwise it to be of no effect; and that in case he should die in good standing, the beneficiary named should be entitled to one dollar from each active member in good standing, not exceeding \$2,000.

*Held.* That as the requirements in the condition are used conjunctively, a failure to comply with all of them were necessary to a recovery, and that a violation of the pledge of total abstinence alone would bar a recovery by the beneficiary. So the words, "in case he is in good standing at the time of his decease, then the person or persons hereinafter named shall be entitled," etc., are not equivalent to saying that if he is not tried or convicted of violating his pledge, etc. Good standing in a society, not only implies that the party is a member thereof, but also that he has a good reputation therein. In such, a violation of the pledge total abstinence, without a trial and conviction, forfeits the right of the beneficiary to recover the sum promised.

In an action upon a contract of a temperance order or society to pay a certain sum to the beneficiary therein named upon the decease of the member entering into the same, upon the express condition that he should faithfully keep his pledge of total abstinence, it is error to exclude parol evidence of his violating such pledge before his death. In such case his trial and conviction

by the order for such violation, need not be shown to defeat a recovery.

*Supreme Council of Royal Templars of Temperance vs. Curd.\**

\* Decision filed Sept. 27, 1884.

ILL. S. C.

### CANCELLATION.

§ 26. FIRE.—*Authority to Make Includes Authority to Reduce Policy and Release from Liability.*—Where the secretary of an insurance company "was instructed to go around and examine the risks and cancel the policies or reduce the amounts where they were considered too large," the execution of such a power as this includes the power to make a contract with a person holding a policy, for the reduction of the policy. The power to make such contract necessarily includes, in the absence of evidence to the contrary, the power to agree upon the terms, including release, etc.

*Susquehanna Mut. F. Ins. Co. vs. Brown.*

Rep'd Jour'l, p. 155.

PA. S. C.

§ 27. FIRE.—*How it Must be Exercised.—Agreement to Accept Less than Ratable Proportion of the Premium when Binding.*—The right of cancellation, reserved by the company, can only be exercised in strict compliance with the conditions. In the absence of any agreement to the contrary, the whole ratable proportion of the premium must be refunded.

*Van Valkenburg vs. Lenox Ins. Co.*, 51 N. Y., 485; *Hathorn vs. Germania Ins. Co.*, 55 Barb., 26; *May on Ins.*, sec. 574; *Wood on Ins.*, sec. 106.

An agreement of the insurer to accept less than the ratable proportion of unearned premium is binding upon him, and where the evidence showed that such an agreement was made and there was no evidence of a mistake, its allegation and proof in connection with the cancellation of the policy, is sufficient defense to an action for recovery on a subsequent loss.

*Ætna Ins. Co. vs. Weisinger.*

Rep'd Jour'l p. 151.

IND. S. C.

## CANCELLATION.

§ 28. *LIFE.—In Case of Fraud.*—A provision in the by-laws, requiring the certificate to be canceled and the money returned in case of fraud in the application, must be complied with in order to avail of the fraud, and a continuation to receive assessments is a waiver of such alleged fraud.

*Webster vs. Ins. Co.*, 86 Wis., 67; *Gans vs. Ins. Co.*, 43 Wis., 108; *Joliffe vs. Ins. Co.*, 39 Wis., 111; *Ergman vs. Ins. Co.*, 44 Wis., 376; *Luther vs. Ins. Co.*, 55 Wis., 543.

*Morrison vs. Wisconsin Odd Fellows' Mut. Life Ins. Co.*

—§ 21.

## CONSTRUCTION.

§ 29. *LIFE.—Of Statute Liability as to Bad Faith.*—In a statute provision regarding the liability of a company for refusing to pay a claim in bad faith, the term bad faith does not mean fraud, but simply frivolous or unreasonable grounds. A refusal of the company to pay on grounds which were not set up in court but where the actual defense was ground which had already been waived, it was bad faith within the statute.

55 Ga., 110-111; 63 id., 205.

*Cotton States Life Ins. Co. vs. Edwards.*

—§ 20.

## EVIDENCE.

§ 30. *LIFE.—Where Verdict is Directed.—Deposition.*—In determining whether a court properly directed a verdict to be found, every evidence tending to prove facts adverse to the direction must be taken as established. A party with consent of court may read only part of a deposition.

*Morrison vs. Wisconsin Odd Fellows Mutual Life Ins. Co.*

—§ 21.

## GENERAL AVERAGE.

§ 31. *INLAND.—Liability for Expenses of Raising and Re-shipment of Cargo in Case of Two Wreckers.*—A vessel with a deck cargo of cotton was sunk, and the captain procured a wrecking

vessel to raise her and receive her cargo. But before her arrival he had secured the services of another vessel to receive and transport the cotton in his own name to his own agent, with instructions to the latter to exact an average bond from the owners upon its delivery. The underwriters, however, obtained possession of the cotton without giving the bond, upon payment of transportation charges. The wrecking vessel had nothing to do with the cotton, but raised the boat with the remaining cargo. *Held*, That the cotton was liable for the general average expenses, which, when there was one continuous effort to save vessel and cargo, should include all the expenses from the sinking of the vessel, and not excepting those incurred for a re-shipment of part of the damaged cargo.

*Mitchell Transportation Co. vs. Patterson.*

Rep'd Jour'l, p. 92.

U. S. C. C. TRIM.

#### INSURABLE INTEREST.

§ 32. INLAND.—*Of stockholder.—Evidence and Effect of Sale.—Amount of Recovery.*—An owner of stock in a corporation has an insurable interest in the corporate property in proportion to the amount of his stock. This interest, though extinguished by a bona fide sale of the property, is not altered by a sham sale. The bill of sale and the enrollment of a steamboat are prima facie evidence of a bona fide sale. Where a party who owned three sixteenths of the capital stock of a corporation insured his interest in the corporate property: *Held*, That in case of loss he was entitled to recover the amount of his policy, up to three sixteenths of the value of such property at the time of loss.

*Seaman vs. Enterprise F. & M. Ins. Co.*

Rep'd Jour'l, p. 97.

U. S. C. C. Mo.

#### KEEPING AND STORING.

§ 33. FIRE.—*What is Not an Increase of Hazard Within the Same Premises.*—The policy was on goods on "grade floor of the two-story, frame, shingle-roof building, situate," etc. On a lot adjoining, and distant a few feet, was a one-story building used as a storehouse, and connected with the first by a covered passageway in the rear. *Held*, That the keeping of prohibited

articles in the storeroom was not a violation of the policy provision against their storage in any building in which was the insured stock. *Held*, That the storage was not a change increasing the hazard within the same premises.

*Sperry vs. Ins. Co. of N. A.*

Rep'd Jour'l, p. 141.

U. S. C. C. Col.

### LOSS.

§ 34. *LIFE*.—*Subsequent Alteration of Time when Payable*.—A provision in the charter that the loss should be payable sixty days after notice, cannot be set aside by a regulation made by the company subsequent to the issue of the policy.

*Morrison vs. Wisconsin Odd Fellows' Mutual.*

—§21.

### PREMIUM.

§ 35. *LIFE*.—*Effect of Failure of Prompt Payment*.—*When Payable on Demand*.—*To whom and where Payment may be made*.—*Parol Evidence to Vary Contract*.—*Effect of Receipt*.—In insurance contracts, the time of payment is material, is of the essence of the contract, and non-payment at the day appointed involves absolute forfeiture of the policy.

*N. Y. Life Ins. Co. vs. Statham*, 93 U. S., 24; *Brooklyn Life Ins. Co. vs. Bledsoe*, 52 Ala., 551.

Where premiums are not payable at stated times, but on the demand of the company, the assured is not bound to take notice when the payment is payable, but can await notice of that fact from the insurer; and where the place of payment is not that appointed in the policy, but is transferred to a point at or near the domicile of the assured, payment of the premium may be made to an agent, upon any receipt the assured chooses to take, though he does not obtain a receipt signed by either of the designated officers of the company. Where a contract is reduced to writing, the written memorial becomes the sole expositor of its terms; all antecedent negotiations, agreements or understandings are merged in it, and to vary or contradict it as to payment of premium, evidence of them is not admissible, unless it be

clearly shown that a party was by fraud induced to enter into the contract, or that by mistake the intention of the parties is not expressed, and a policy of life insurance is within this conservative principle.

Mead vs. Steger, 5 Port., 489 ; Paysant vs. Ware, 1 Ala., 160 ; Hair vs. La Brouse, 10 Ala., 548 ; Ins. Co. vs. Wolff, 95 U. S., 326 ; Thompson vs. Ins. Co., 104 U. S., 252 ; Ins. Co. vs. Norton, 95 U. S., 234 ; Ins. Co. vs. Mowry, ib., 544 ; Ins. Co. vs. Eggleston, ib., 572 ; Phoenix Ins. Co. vs. Doster, 106 U. S., 30.

A receipt of a premium, after a breach of the condition for its payment has occurred, is doubtless a waiver of the forfeiture, but the payment must be made to the insurer, or to an agent having authority to receive it, and it must be made fairly and honestly, without any misrepresentation or concealment of material facts known to the party making the payment, of which the insurer cannot reasonably be presumed to have knowledge.

*Mobile Life Ins. Co. vs. Pruett.*

—§ 19.

#### PLEADING.

§ 36. LIFE.—*Absence of Counsel as Ground for Continuance.*—*Objections to Leading Questions and Profs.*—Continuance of cases on account of absence of counsel are not favored, and absence without leave to attend other trials is no good ground for such continuance. Objections must be made, if leading questions, or proving by parol of writings without proof of loss, or inaccessibility of originals are to be ruled against.

*Cotton States Life Ins. Co. vs. Edwards.*

—§ 20.

#### RESIDENCE.

§ 37. LIFE.—*Effect of Commutation.*—*Waiver of Misstatement as to Age in Profs.*—It would seem that where a policy had been commuted for a proportional paid-up, according to its terms, with an indorsement that it was valid for such proportion subject to its creditors, the contract was fully executed, and the insured would be exempt from a provision against going into the torrid zone.

81 N. Y. R., 410 ; 75 Ill., 426 ; 39 Mich., 51 ; 53 Wis., 585.

Where a discrepancy as to age appeared from the application and proofs, and the company with knowledge of a violation of the provision as to residence accepted and declared the proofs satisfactory, this was a waiver of the misstatement as to age and of the violation. An error as to age in proofs may be explained.

45 N. Y. Superior Court, 259.

*Cotton States Life Ins. Co. vs. Edwards.*

—120.

### SEAWORTHINESS.

§ 38. INLAND.—*Implied Contract as to.—Due Diligence as to Repairs.—Perils of Navigation.*—There is an implied contract on the part of the insured of an interest in a vessel for a particular voyage, that she shall be seaworthy when she leaves the port of departure, and that if she becomes unseaworthy while on her voyage the master shall use a reasonable discretion and have the defect remedied at the nearest convenient port. The necessity for haste in making repairs, in case the vessel becomes unseaworthy during her voyage, depends upon the character of the defect; the more serious it is the greater the necessity for prompt attention. The question of whether or not reasonable diligence has been used in a given case is for the jury to decide. The fact that a vessel was unseaworthy when it left the port of departure, or became so afterwards and due diligence was not used in having her repaired, will not prevent a recovery by an insurer in case of loss, unless the loss has been contributed to, or caused by the defect. Perils in making landings are perils of navigation.

*Seaman vs. Enterprise F. & M. Ins. Co.*

—122.

### TOTAL LOSS.

§ 39. MARINE.—*When Constructive.—Right of Abandonment.—Method of Estimating Measure of Damages.—One Third New for Old.—Repairs.—Adjustment of Expenses.*—The right of abandonment does not depend on the high probability of a total loss, either of the property, or of the voyage, or both. The insured is



to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.

*Bradlie vs. Maryland Ins. Co.*, 12 Pet., 378.

In ascertaining the value of the ship, and whether she is injured to the amount of half her value, the true basis of the valuation of the ship at the time of the disaster; and if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss.

*Patapsco Ins. Co. vs. Southgate*, 5 Pet., 604.

The ordinary deduction in case of a partial loss of one third new for old, from the repairs, is inapplicable to the case of a technical total loss by an injury exceeding one half the value of the vessel. The expense of raising and towing a sunken and disabled vessel to a port of repair, no matter by whom paid, should be considered as part of the loss, and it is immaterial that a part of this cost has been contributed upon an adjustment in the nature of general average by the cargo.

*Bradlie vs. Maryland Ins. Co.*, *supra*; *Sewall vs. U. S. Ins. Co.*, 11 Pick., 90; in *Ellicott vs. Alliance Ins. Co.*, 14 Gray, 318; and in England, in *Kemp vs. Halliday*, 6 Best & S., 723; 2 Para., Mar., Ins. 133.

Policy construed, and *Held*, That there was nothing in the special provisions thereof to preclude the insured from recovering for a constructive total loss after abandonment, when the amount of the repairs, deducting one third new for old, added to the expense chargeable to it of raising and taking the vessel to the port of repairs, exceeded one half its agreed value.

*Sewall vs. U. S. Ins. Co.*, 11 Pick., 90, and *Ellicott vs. Alliance Ins. Co.*, 14 Gray, 318. Distinguishing *Greely vs. Tremont Ins. Co.*, 9 Cush., 416; *Orrok vs. Insurance Co.*, 21 Pick., 456; *Hall vs. Insurance Co.*, *id.*, 472; *Reynolds vs. Insurance Co.*, 22 Pick., 191; *Paddock vs. Commercial Ins. Co.*, 104 Mass., 536; *McAndrews vs. Thatcher*, 3 Wall., 347.

*Wallace & Cunningham vs. Ins. Cos.*

*Rep'd Jour'*, p. 106.

U. S. C. C. Mo.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### UNITED STATES CIRCUIT COURT.

WESTERN DISTRICT OF TENNESSEE.

MITCHELL TRANSPORTATION CO. }

vs. }

ROBERT F. PATTERSON ET AL.\* }

A vessel with a deck cargo of cotton was sunk, and the captain procured a wrecking vessel to raise her and receive her cargo. But before her arrival he had secured the services of another vessel to receive and transport the cotton in his own name to his own agent, with instructions to the latter to exact an average bond from the owners upon its delivery. The underwriters, however, obtained possession of the cotton without giving the bond, upon payment of transportation charges. The wrecking vessel had nothing to do with the cotton, but raised the boat with the remaining cargo.

*Held*, That the cotton was liable for the general average expenses which when there was one continuous effort to save vessel and cargo, should include all the expenses from the sinking of the vessel and not excepting those incurred for a re-shipment of part of the damaged cargo.

LINCOLN & STEVENS, and H. C. WARRINER, *for Complainants.*  
CLAPP & BEARD, *for Defendants.*

BAXTER and HAMMOND, JJ.

This was a case in equity, by which the owners of the steamer

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\* Decision rendered January 17, 1884.

*Robert Mitchell* sought to recover from sundry defendants, their shares of a general average expense made in endeavoring to raise the said steamer and the cargo on board. The following are the facts of the case :—

The steamer *Robert Mitchell*, while on a trip from Cairo to New Orleans, struck some hidden obstruction in the Mississippi River at a point near Fox Island, and sank; this island is about 60 miles below Memphis, Tenn.

The boat and cargo were in imminent peril of total loss. She had on board an assorted cargo of grain, flour, meal, hay, horses, oil, and about 750 bales of cotton, the latter upon the guards and in the engine-room of the boat.

There being at the place of disaster no adequate means of removing or protecting the cargo, or of obtaining any assistance by telegraph or letter, the captain left the *Mitchell* in charge of the mate, with instructions to keep the cotton and other cargo from floating off and to save and protect it so far as could be done, went to Memphis and ordered the wrecking-boat then lying below St. Louis, to go at once to the *Mitchell*. He also found the steamer *Choteau* at the landing, loading for New Orleans, and engaged her at an agreed freight or salvage, to stop on her down trip at the place of disaster and assist in taking off the cotton and other freight stowed upon the deck as well for the purpose of lightening the *Mitchell* and preparing to raise her and the remaining cargo on board, as for sending the cargo so removed forward to its destination or to a place of better security. The captain of the *Mitchell* accompanied the *Choteau* to the place of accident, but upon arrival found the condition of things to have become more serious, and the *Choteau* refused to receive and transport the cotton except at an increased freight or salvage. An agreement as to price was reached and the master and crew of the *Mitchell* assisted the crew of the *Choteau* to unload the greater portion of the cotton with other freight which was on the deck and in the engine-room, and place it upon the *Choteau*.

There was no place at or near this point, where the cargo thus removed to the *Choteau* could be protected and saved from further loss so well or cheaply as by sending it on to New Orleans, the port of destination. The captain of the *Mitchell* shipped it all in his own name to an agent selected by him in New Orleans, with instructions to deliver it to the consignees upon their signing an average bond. Upon its arrival in New Orleans, the underwriters of the cotton obtained possession of it upon the payment of the *Choteau's* freight,

without giving any average bond; they claimed that it was not a case for a general average.

This cotton and other cargo received by the *Choteau* and forwarded to New Orleans did not require for its removal and protection, the aid of the wrecking boat, but it was protected upon the *Mitchell* by her own officers and crew, who assisted the crew of the *Choteau* in removing it from the *Mitchell* and placing it upon the *Choteau*. The wrecking boat was in the mean time on its way to the *Mitchell*, but did not arrive there until after the *Choteau* left with the cotton in question. It did, however, arrive at the *Mitchell* and had commenced efforts to raise her and the remaining cargo, several days before the *Choteau* arrived at New Orleans; the cotton in question was delivered to the agent appointed by the captain of the *Mitchell*, and before the same came to the underwriters of the cotton.

In the raising of the *Mitchell*, difficulties not anticipated were encountered, and portions of the boat had to be cut away. The value of the boat and remaining cargo raised, was but about one third the value of boat and cargo including the cotton in question. The freight money of the cotton to New Orleans upon the *Choteau* was included in the average expense, but very much the largest part of the expense was that of the wrecking boat and the efforts to raise the *Mitchell* and the cargo left upon her, after the cotton had been placed upon the *Choteau*. It is usual in such cases to employ a wrecking boat and the deck cargo is generally removed for the purpose of lightening the sunken vessel and of thereby aiding to raise it and the cargo remaining upon it before the wrecking boat can effectually proceed with its work; though in this case the wrecking boat did not actually aid in removing the deck cotton. The efforts to relieve the *Mitchell* and her cargo, however, were continuous from the time of the disaster to the raising of the boat with the cargo on board. Proof was offered to show that under the circumstances developed in this case it was the custom on the Western rivers to embrace all the expenses claimed in the general average statement.

Under these circumstances it was claimed by the underwriters upon the cotton, that the captain of the *Mitchell* had separated the cotton from the *Mitchell* and put it in a place of security, without any intention of again placing it on her or of completing his trip, and that it could not therefore be required to contribute for any part of the expenses subsequently incurred in raising the *Mitchell* and her remaining cargo, as the cargo was not taken or intended to be taken on board the *Mitchell*, and as she did not complete her trip. The case

of *Job vs. Langston*, 6th EL. & BL., 790, and other English and American cases were relied upon to sustain that position.

On the other hand it was contended that the shipment of the cotton by the captain of the *Mitchell* in his name to an agent appointed by him, with instructions not to deliver it without an average bond, showed that he did not intend to separate it from the general expense; that the owners of the cotton and their underwriters were interested in the saving of the *Mitchell* and her remaining cargo, in order that the cotton might be under the protection of the general average until its arrival and safe delivery in New Orleans to the consignees, and that being so interested in saving all that could be saved as a contributing interest, the case was under the American law one of general average; that all the property in peril at the time of the disaster and when the efforts to protect and save it were commenced must be taken into the average as a contributory interest.

By THE COURT :—

The captain of the *Mitchell* did not, evidently, intend to separate the cotton of defendants from the rest of the cargo nor to deliver it to them at their own risk after the disaster. Not only did he ship it to his own account and direct that it should not be delivered to the original consignees without an average bond, but on his coming to Memphis he did not notify the consignors nor rely on them to save their shipments. The case is one for general average, and the fact that the *Mitchell* did not complete her trip but returned when raised to the nearest port of safety for repairs, should not defeat the contribution under the facts of this case.

The custom to include certain expenses in the general average is, perhaps, not admissible as evidence, but in this case there was, in effect, one continuous effort to save the sunken vessel and her cargo, and the average should include all the expenses from the sinking of the vessel, not excluding those incurred for the re-shipment of a part of the damaged cargo from Memphis to New Orleans on the *Choctaw*.

Decree accordingly.

## UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI:

SEAMAN

vs.

ENTERPRISE FIRE &amp; MARINE INS. CO.\* }

An owner of stock in a corporation, has an insurable interest in the corporate property in proportion to the amount of his stock.

This interest, though extinguished by a bona fide sale of the property, is not altered by a sham sale.

The bill of sale and the enrollment of a steamboat are prima facie evidence of a bona fide sale.

There is an implied contract on the part of the insured of an interest in a vessel for a particular voyage, that she shall be seaworthy when she leaves the port of departure, and that if she becomes unseaworthy while on her voyage, the master shall use a reasonable discretion and have the defect remedied at the nearest convenient port.

The necessity for haste in making repairs, in case the vessel becomes unseaworthy during her voyage, depends upon the character of the defect; the more serious it is the greater the necessity for prompt attention.

The question of whether or not reasonable diligence has been used in a given case is for the jury to decide.

The fact that a vessel was unseaworthy when it left the port of departure, or became so afterwards, and due diligence was not used in having her repaired, will not prevent a recovery by an insurer in case of loss, unless the loss has been contributed to or caused by the defect.

Perils in making landings are perils of navigation.

Where a party who owned three sixteenths of the capital stock of a corporation insured his interest in the corporate property, *Held*, That in case of loss, he was entitled to recover the amount of his policy up to three sixteenths of the value of such property at the time of loss.

Suit upon a policy of insurance upon a steamboat owned, as alleged, by the C. V. Kountz Transportation Company. The insured

\* Decision rendered September 25, 1884. From *Federal Reporter*.

vessel, while making the trip specified in the policy, accidentally struck the river bank in attempting to make a landing, and was so injured that she sank and became a total loss. The other material facts and the points made in the defense sufficiently appear from the charge.

MADILL & RALSTON, *for Plaintiff.*

GIVEN CAMPBELL, *for Defendant.*

BREWER, J.

This plaintiff claims to be the owner of 74 shares of stock, or three sixteenths of the stock of this company, and that, by reason of that ownership, he has or had an insurable interest in this boat to that extent. His interest arises or arose by virtue of the fact that he owned the stock in the corporation—the Kountz Transportation Company, which corporation owned the boat. As the owner of the stock he had a right to insure his proportionate interest in the boat ; that is, if he owned three sixteenths of the stock he could insure three sixteenths of the boat, and if the boat, at the time of the loss, belonged to the transportation company, he had an interest to be protected by this policy. It is claimed that there was a sale of that boat by the company prior to the loss. In support of that a bill of sale is produced. The enrollment is produced. *Prima facie* that bill of sale and that enrollment show that there was a sale ; and when I say *prima facie*, I mean that if there were no other testimony in the case you would be bound to find that the boat had been sold by the transportation company, and that this plaintiff had no interest in the boat. But the plaintiff says, and the burden of proof is on him to establish what he says, that there was in fact no sale, no honest bona fide sale, by the transportation company. As a stockholder he would be bound by an honest sale, whether he liked it or not, and he must take, if such a sale was made, simply his interest in what was received ; for you can very easily see, in that respect, that, if the company had sold the boat and gotten so much money, it would be unjust for him to have an interest in that money and still have an insurable interest in the boat which did not belong to the company and which did belong to a third party. So the question is whether this transaction, which took place in New Orleans, was by the company a bona fide sale. If it was a mere sham, a mere putting up of papers, a mere going through the form of a sale in order to place the apparent title in some third party to prevent seizure, or

for any other reason, then that kind of a sale does not conclude him. Whatever might be true of the corporation, as a stockholder, he might say, I never authorized the president, or any other officers, to go through the form and trick of a pretended sale; that property still belongs to the corporation, at least, so far as the protection of my interests are concerned.

I shall not review the testimony in detail as to what took place at New Orleans, nor endeavor to criticise or comment upon it. It is very full, and I think you will have no difficulty in arriving at a conclusion as to whether that was a sham sale—a mere putting of the title in the name of an alleged purchaser, Charles B. Jones, for the sake of avoiding liabilities there—or a bona fide sale of the property, vesting the title and ownership of the boat in C. B. Jones. In reference to such a transaction, generally, I may say that a sale cannot be consummated without the assent of the seller and the purchaser; I cannot force upon either one of you the title to property which I own, no matter what papers I may execute. You have a right to be consulted in the determination of the question whether you will take the title. But if there was at the time, with the assent of the corporation through its president, who had authority to make a bona fide sale, and the assent of the purchaser to whom this sale it is claimed was made, an honest bona fide sale of the property, the rights of the plaintiff in the boat ceased, and your verdict must be for the defendant. If, on the other hand, it was a mere trick, a mere pretense, a mere going through with the form of a conveyance, without any intention that the property should be the property of the purchaser, an intention entered into and assented to by both seller and the purchaser, then it is no sale so far as this is concerned. As I said, or intended to say, and I repeat it in order that there may be no mistake about it, the enrollment and the bill of sale are prima facie evidence of the transfer of the title, and unless the testimony satisfies you that there was no bona fide sale, the verdict must be for the defendant.

The other question runs as to the accident itself. It is claimed by the defendant that this boat was not seaworthy when she left the port of departure, and not seaworthy at the time of the accident, and the question is, what is seaworthiness? because, as a matter of law, whether expressed or not in the policy, there is an obligation on the part of the boat—the owners of the boat—to see that when she leaves the port of departure she is seaworthy, and this plaintiff, although he may not have been an officer or present here to examine, yet is



bound by that obligation. It is a part of the contract of insurance that the boat shall be seaworthy when it leaves the port of departure, which in this case was St. Louis. And that is fair when you stop to think of it a moment. The insurer has no possession of the property ; in this case it is a corporation residing elsewhere, and it could not be present and examine the condition of every boat it insured. It is the duty of the owners to themselves see that it is seaworthy when it leaves the port of departure.

Now, what is seaworthiness? In order that a boat should be seaworthy it is not necessary that it should be provided with everything that would be convenient and pleasant to have on the boat in its voyage, but it is necessary that it should be provided with everything which will tend to make it reasonably safe for the voyage which it is intended to make. It will not do to say that because the thing can be done—a voyage can be made without this or that—that therefore a boat is seaworthy. Take an illustration outside of the river : A vessel crossing the ocean should be provided with its masts and rigging—all the masts and rigging which that vessel ordinarily carries, which are reasonably necessary for the movement of that vessel ; and while you and I may know, as a matter of fact, that many a vessel has been carried across the ocean safely with two thirds of its masts and the bulk of its rigging gone, yet you cannot say of such a vessel, that it was seaworthy ; it had not been put in that condition which prudent and reasonable seafaring men would require in order to encounter the perils and dangers which might be expected. So, when this boat left the port of St. Louis, it should have been put in that reasonably safe and prudent condition which, having in view all the perils which might reasonably be expected it would encounter in the voyage, was sufficient to guard against those perils.

The particular complaint of the condition of the boat is the lack of the starboard wing rudder, and much testimony has been given before you as to the necessity of such a rudder, and its value in controlling the motions of the boat ; testimony has also been offered to the effect that boats are built and managed without any wing rudders. Now, the question in that respect is, not whether a boat could be managed without any wing rudders, or with only one wing rudder, or whether other boats are constructed with only balance rudders, because, as you will remember, the testimony developed before you that there was some difference in the shape of the sterns of these different boats—some with skaggs, and some without. The question

is whether, as to this boat, considering the size, the manner in which it was constructed, the size of the balance rudders, the amount of load which it might reasonably be expected to carry, the condition of the river, and the perils of the voyage it was to make, it ought reasonably and fairly to have had the four rudders at the time it left the port of departure, or anywhere along down the river. If you say, from the testimony, that the want of this starboard rudder did not materially effect the steerage power of the vessel, or prevent the pilot from maintaining good control over its motion, why, then, the omission of the rudder at the port of departure, or anywhere along the line, cannot be said to be a lack of seaworthiness; but, if that was a material factor, reasonably necessary, not merely when going down stream, or backing, but in the various contingencies which will arise in the course of a voyage—if such fourth rudder was reasonably necessary in order to give the proper control of the boat to the pilot—then the lack of such fourth rudder rendered the boat unseaworthy.

If you find that there was no need of that fourth rudder, that closes the question, you need not go any further; but if you find that that rudder was necessary to make it seaworthy, then the question comes as to the duty incumbent upon a boat, and its officers and owners, in respect to the voyage. The duty is absolute at the port of departure to see that it is seaworthy. If, after leaving the port of departure, the injury happens, then the master of the boat is vested with reasonable discretion. He is not bound, because some little defect happens, to stop his boat. If it was a sea voyage, he could not do it, perhaps; he is not always bound to turn to the nearest port; that will depend on the nature of the injury—the extent to which it affects the ability of the boat to make a successful voyage. He is bound to use a reasonable discretion, and, at the nearest convenient port, to remedy any defect which makes the boat unseaworthy. And what is the nearest convenient port depends upon the facts of the case; what is the imperativeness of the necessity depends upon the extent of the injury. If it is a little matter, that affects but slightly the voyage or control of the boat, then the necessity for stopping is not so imperative as if the injury is such as wholly destroys the power of control; and it is for the jury in that respect to say whether the conduct of the master was reasonably prudent, if, after leaving the port of departure, and the accident happening after leaving the port of departure, he is informed of the injury.

You must not understand that it is his imperative duty to stop the

moment he finds it out, nor is he at liberty to go on indefinitely without seeing it repaired. He must consider all the circumstances under which he is placed, the liability to repair the loss, the place where the loss can be repaired, the condition in which the boat is on account of the stage of water, the amount of load it possesses, the ability of the pilot to control the motion—and the question is whether, taking all these things into consideration, he acted with reasonable discretion in the matter.

But then, suppose you find that the boat was not seaworthy at the port of departure, or that, becoming unseaworthy after it left the port of departure, the master did not exercise reasonable prudence in repairing the defect, the further question comes, whether the loss was owing to that defect. If the loss was in no manner owing to the defect, then it will be disregarded. Take this illustration. Supposing a boat starts off without sufficient rudders, but the loss comes from an explosion of the boiler, something in no manner connected with that defect, then the existence of the defect does not vitiate that policy. It is only where, there being a defect which makes the boat unseaworthy, that defect, either in whole or in part, causes the injury. So you go down to the time of the loss, and inquire from the testimony what caused it; was it mismanagement on the part of the pilot, or a failure of the engineer to obey the direction of the pilot—a failing to back when he should have backed, and sending the boat forward? Was it because of the defect in the arrangement of the freight on the boat, so that it was not under the control of the pilot? Was it on account of the stage of water? If it was solely caused by other matters than this alleged defect in the matter of the steering capacity, or want of a rudder, then the policy is holden, or the insurer is holden on the policy. It is only when the defect exists, and when it is one which, either in whole or in part, contributes to the loss, that the policy is void; and these are all questions of fact for you to determine.

In reference to them, summing them up briefly, let me say that the papers, the bill of sale and the enrollment, *prima facie* show a transfer of title. The plaintiff must show that the sale was fictitious and a sham. If he has done this, the whole thing may be disregarded, and his right to recover is not affected by that sale. Second, the question of seaworthiness is whether the boat was placed or continued in a reasonably safe and proper condition for making the voyage which it was intending to make. Third, the master (if the defect rendering the boat unseaworthy you find occurred after leav-

ing the port of departure) had a reasonable discretion, considering all the circumstances of this case, to repair that defect in as speedy a manner as he could. And, fourth, if the defect did not, either in whole or in part, contribute to this loss, it may be disregarded. The injury, as stated by counsel, and very properly, must be one of the perils of navigation; that is, it must have been caused in the navigation of the boat, and flowing from the ordinary perils which come from navigating the river. Included in that is the manner of approaching the landing, as well as moving down the stream.

If you find for the defendant, the form of your verdict will be, simply, "We, the jury, find for the defendant;" if, on the other hand, you find for the plaintiff, the form of your verdict will be, "We, the jury find for the plaintiff, and assess his damages at" such sum as you name. In reference to the question of damages, if you find for the plaintiff, you will take the value of the boat at the time of the loss. You have heard several witnesses on both sides give to you their opinion as to the value, and the reasons for that opinion, and from that you will determine what the value of the boat was, and award the plaintiff three sixteenths of that value as your verdict, together with interest from August 10, 1881, at 6 per cent; that is, you will take three sixteenths of the value of the boat at the time of the injury, and compute the interest on that at 6 per cent from August 10, 1881, to the present time, and that, if you find for the plaintiff, will be the amount of his damages; and the form of your verdict will be, "We, the jury, find for the plaintiff, and assess his damages at" that sum.

The jury returned a verdict for the plaintiff.

A motion for a new trial was thereupon made by the defendant, and the following opinion was rendered thereon, viz.:—

BREWER, J.

In this case, which was tried before me the other day, a verdict was rendered for the plaintiff, and a motion made for a new trial. The question involved is this, whether a stockholder in a corporation has an insurable interest in the property of the corporation. Upon that question counsel for defendant says there are but two authorities prior to this case—one a case from Ohio—20 Ohio, 174. An examination of that case shows that the question involved was this: Certain stockholders in a corporation insured their property, and in an application represented that the fee-simple title was in themselves, but it turned out that the fee-simple title was in the corporation, and the decision was that there was a breach of the warranty—

a misrepresentation which avoided the policy. At the close of the opinion there is a dictum, and it is only a dictum, that a stockholder in a corporation has no insurable interest in the property of the corporation. The other case is in 31 Iowa, 464. There the supreme court, where the question was distinctly presented, affirmed that a stockholder did have an insurable interest. In the present case, the question was raised before my predecessor upon demurrer to the petition, and he decided that the stockholder had an insurable interest in the property of the corporation. Whether that concludes me or not, I agree with him ; I think that a stockholder in a corporation does have an insurable interest. It is not necessary, in order to create an insurable interest, that the fee-simple title be vested in the insured. It is enough that he has a direct pecuniary interest which may be destroyed, and is entitled to protection.

Now, if the corporation owns but a single piece of tangible property, the destruction of that property by fire or other loss, certainly destroys the value of his stock, or at least diminishes it. He has an interest in the protection of that property. In this case it appeared that the corporation owned a steamboat ; that was substantially all its assets. Now, the destruction of that property certainly diminishes the value of the stock held by this plaintiff. He had an interest in the preservation of that property, and he had an insurable interest. If the property was the entire property of the corporation, the destruction of the property practically wiped out the value of his stock. So that I think it is fair to say that a stockholder in a corporation has an insurable interest in the personal, tangible property of the corporation. The policy was taken by the defendant upon his interest. The destruction of the property destroyed that interest, and he is entitled to recover.

I do not mean to say that questions may not arise in which the value of the property destroyed may not be the measure of his damages. In the case put by the Supreme Court of Iowa, supposing the entire property was a grain elevator, which, by reason of its proximity to a railroad, had a large value, a value in excess of the cost of the elevator, they intimate that the destruction of that elevator might cause a loss to the stockholder in excess of his proportionate share of the cost of the property itself ; so, on the other hand, if it appeared that a corporation was in debt largely in excess of the value of its corporate property, and that there was no personal liability upon the stockholder—it might be that the destruction of the property would work no loss to him, because the property would not

pay the debts, and he, having no personal liability, would lose nothing, whether the property was destroyed or not. So, in another case, supposing the property was fully insured by the corporation, and the loss was paid to the corporation, it might be that he would have no separate interest as a stockholder protected by insurance, but would only have recourse upon the assets of the corporation, represented by the amount paid by the insurance company to the corporation.

But these questions simply affect the measure of damages; and the general proposition which is affirmed by the decision of my predecessor, and by the decision of the Supreme Court of Iowa, and in which I concur, is that a stockholder has an insurable interest in the personal tangible property of the corporation. In this case, from the testimony, I instructed the jury that the measure of damages was the proportionate interest of the stockholder in the corporation in the value of the boat. Under the testimony I see no reason to doubt the propriety of the instruction, and the motion for a new trial will be overruled.

## UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

WALLACE vs. THAMES &amp; MERSEY INS. CO. (Two Cases.)

CUNNINGHAM vs. MECHANICS &amp; TRADERS' INS. CO.

WALLACE vs. BRITISH AMERICAN ASSURANCE CO.\*

The right of abandonment does not depend on the high probability of a total loss either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense.

In ascertaining the value of the ship, and whether she is injured to the amount of half her value, the true basis of the valuation is the value of the ship at the time of the disaster; and if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss.

The ordinary deduction in cases of a partial loss of one third new for old, from the repairs, is inapplicable to the case of a technical total loss by an injury exceeding one half the value of the vessel.

The expense of raising and towing a sunken and disabled vessel to a port of repair, no matter by whom paid, should be considered as part of the loss, and it is immaterial that a part of this cost has been contributed upon an adjustment in the nature of general average by the cargo.

Policy construed, and held that there was nothing in the special provisions thereof to preclude the insured from recovering for a constructive total loss after abandonment, when the amount of the repairs, deducting one third new for old, added to the expense chargeable to it of raising and taking the vessel to the port of repairs, exceeded one half its agreed value.

MATTHEWS, J.

These are actions upon several policies of marine insurance upon

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\* From Federal Reporter.

the schooner *John Wesley*, the respective plaintiffs being each the owner of one fourth interest. The vessel was valued in the policies at \$12,500. The amount of insurance is \$10,000; each policy being for \$2,500. The plaintiffs claim to recover for a constructive total loss. The defendants admit only a partial loss. The causes have been submitted to the court, the intervention of a jury being waived, upon a written stipulation as to the facts, as follows :—

“(1.) That while said policy was in full force, and on or about the twenty-fifth of September, 1883, said schooner, while on a voyage, as alleged in the declaration, was, by reason of the peril insured against by said policy, stranded and wrecked near Windmill Point, on the north shore of Lake Erie; that she had on board at the time a cargo of about 595 tons of iron ore. (2.) That by reason of such stranding, and the perils incident thereto, said schooner was greatly injured and damaged, and that it was impossible to release her from her perilous situation without the assistance of wrecking tugs, divers, steam-pumps, lighters, etc. (3.) That after such loss and stranding the owners of said schooner abandoned her to the underwriters; that notice of such abandonment was duly served, and that subsequently the insurers, by the means of steam-tugs, steam-pumps, and the usual wrecking outfit, succeeded in releasing the said schooner and cargo, and took them to the port of Buffalo, which was the nearest port at which said schooner could receive the necessary repairs; that the expense thereby incurred amounted to the sum of \$5,367.60; and that the cost of repairing said schooner will be, according to the survey made, the sum of \$3,998.70, one third new for old having been deducted. (4.) That an ex parte adjustment was made of the expenses of raising and wrecking said schooner, and taking her to said port of repairs; and that according to said adjustment said schooner was liable to pay the sum of \$3,316.86. (5.) That if the cost of rescuing said schooner and taking her to said port for repairs without deducting one third therefrom is to be added to the costs of said repairs, then the plaintiff is entitled to recover as for a constructive total loss; otherwise, he is entitled under the policy to recover only for a partial loss.”

The policies are substantially alike. Each of them contains, in usual form, the suing and laboring clause, with the provision that in all cases of loss or damage one third new for old shall be deducted from the amount of actual cost of repairs, or estimates for same, except on anchors. They also contain the following :—

“It is agreed that the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the insured shall not have a right to abandon in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount hereby insured. Nor shall detention by the season, or by any other cause,



be alleged or allowed as a cause of abandonment. \* \* \* And the valuation of said vessel expressed in this policy shall be considered the value in adjusting total, partial or particular average losses covered by this policy, general and in the nature of general average, losses excepted."

It is claimed on the part of the plaintiffs, respectively, that the loss should be adjusted as a constructive total loss, entitling them to abandon and to recover the whole amount insured, as follows :—

(1) Loss apportioned to the hull under the general average statement,	- - - -	\$3,316 86
Less owner's uninsured interest,	- - - -	663 37
		<hr/>
		\$2,653 49
(2) Net partial loss on hull,	- - - -	\$4,998 38
Less owner's uninsured interest,	- - - -	998 38
		<hr/>
		4,000 00
		<hr/>
Total loss,	- - - -	\$6,653 49

Which is more than one half of the agreed value of the vessel.

On the other hand, it is admitted, on the part of the defendants that the insurers are liable for the expenses of raising and taking the vessel from the place of the disaster to the port of repairs, so far as charged against the vessel in general average, and also for the net cost of repairs, deducting one third new for old ; but that the two separate charges cannot be added so as to convert the loss into a constructive total loss, or in the alternative, that if the two liabilities are to be added, then that one third must be deducted, under the terms of the policy, from the cost of raising and taking the vessel to the port of repairs, in order that the adjustment may be as of a partial loss, in which event the whole amount will be less than one half the agreed value, and therefore not enough to constitute a constructive total loss.

The principles of the law of marine insurance, which would regulate and determine the rights of the parties upon the facts of this case, leaving the special provisions of the policies sued on out of consideration, were authoritatively settled in the courts of the United States by the decision of the supreme court in the case of *Bradlee vs. Maryland Ins. Co.*, 12 Pet., 378. Upon the subject of the right to abandon, it was then said :—

"In many cases of stranding, the state of the vessel at the time may be such, from the imminency of the peril, and the apparent extent of the expenditures required to deliver her from it, as to justify an abandonment, although by some fortunate occurrence she may be delivered from her peril

without an actual expenditure of one half of her value after she is in safety. Under such circumstances, if, in all human probability, the expenditures, which must be incurred to deliver her from her peril are at the time, so far as any reasonable calculations can be made, in the highest degree of probability, beyond half value, and if her distress and peril be such as would induce a considerate owner, uninsured and upon the spot, to withhold any attempt to get the vessel off, because of such apparently great expenditures, the abandonment would doubtless be good."

And the statement of the doctrine by Chancellor Kent, 3 Comm., 321, was quoted with approval, that "the right of abandonment does not depend upon the certainty, but on the high probability, of a total loss, either of the property or of the voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense." "In respect to the mode of ascertaining the value of the ship," it was further said by the court in that case, "and, of course, whether she is injured to the amount of half her value, it has, upon the fullest consideration, been held by this court (*Patapsco Ins. Co. vs. Southgate*, 5 Pet., 604) that the true basis of the valuation is the value of the ship at the time of the disaster; and that if, after the damage is or might be repaired, the ship is not or would not be worth, at the place of the repairs, double the cost of the repairs, it is to be treated as a technical total loss." And also: "It follows from this doctrine that the valuation of the vessel in the policy, or the value at the home port, or in the general market of other ports, constitutes no ingredient in ascertaining whether the injury by the disaster is more than one half the value of the vessel or not. For the like reason, the ordinary deduction, in cases of a partial loss, of one third new for old from the repairs, is equally inapplicable to cases of a technical total loss by an injury exceeding one half of the value of the vessel." And it was held in that case that an amount found due to salvors for rescuing the vessel and cargo, and taking them into a port of distress and of repairs, and charged, in an adjustment of general average, upon the vessel as her contributory share, must be counted as an expenditure to be added to the cost of repairs, which, if in the aggregate they amounted to more than half the value of the vessel, entitled the insured to recover for a constructive total loss. That in that case this expense was paid under the name of salvage is immaterial. The expense of raising and towing the sunken and disabled vessel to a port of repairs, no matter

by whom paid, would be considered as part of the loss, and it is equally immaterial that a part of this cost has been contributed upon an adjustment in the nature of general average by the cargo. If there had been no cargo, the whole would have been chargeable upon the vessel as a part of the loss covered by the policy. It is difficult to see upon what principle it can be claimed that reducing the amount of the insurer's liability, by sharing it with another interest, would change the character of the claim so as to exonerate the insurer altogether. The point has been expressly ruled in accordance with the decision in *Bradlie vs. Maryland Ins. Co.*, *supra*; *Sewall vs. U. S. Ins. Co.*, 11 Pick., 90; in *Ellicott vs. Alliance Ins. Co.*, 14 Gray, 318; and, in England, in *Kemp vs. Halliday*, 6 Best & S., 723; 2 Pars. Mar. Ins., 133.

A comparison with this state of the law, of the special stipulations of the policy, will show clearly the changes in the rights and obligations of the parties intended to be introduced by their contract. They are as follows:—

*First.* The right of abandonment is made to depend upon the result and not upon a calculation of probabilities. No right to abandon is admitted when the loss is not strictly and technically an actual total loss, unless, as it turns out, the expense of restoration exceeds one half the value.

*Second.* The cost of repairs is to be adjusted for the purpose of determining such excess as if the loss were admitted to be partial; that is, by deducting one third new for old. The language is that "the assured shall not have the right to abandon the vessel in any case unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured." If the loss in the present case was adjusted on the principle of a partial loss, there would be a deduction of one third new for old from the cost of repairs, and to that would be added the vessel's proportion of the expense of raising and taking her into the port for repairs. If the whole amount exceeds half the amount insured, the loss by construction becomes total; otherwise, not. It will be observed that no deduction is made from the cost of raising and navigating the vessel into the port of repairs; for the deduction of one third new for old in its nature is not applicable to anything but actual repairs.

*Third.* The amount of the loss as thus calculated must exceed, according to the terms of the policy, one half the amount insured, which is the agreed value of the vessel, the insured being regarded

as his own insurer for so much of her value as is not covered by the policies. By the law as it stood unaffected by the contract, the value, which measured the loss, was the actual value of the vessel at the time and place of the disaster.

In no other particular than these have the parties seen fit by their special contract to alter their rights and obligations as defined by the general law of insurance. There is consequently nothing in the special provisions of the policy to preclude the insured from recovering for a constructive total loss, after abandonment, when the amount of the repairs, deducting one third new for old, added to the expense chargeable to it of raising and taking the vessel to the port of repairs, exceeds one half its agreed value. This conclusion is not inconsistent with the decisions in the cases of *Greely vs. Tremont Ins. Co.*, 9 Cush., 416; *Orrok vs. Insurance Co.*, 21 Pick., 456; *Hall vs. Insurance Co.*, id., 472; *Reynolds vs. Insurance Co.*, 22 Pick., 191; *Paddock vs. Commercial Ins. Co.*, 104 Mass., 536, and others cited on behalf of the defendants. The point in those cases applicable to the present argument is that a general average loss cannot be added to the net cost of repairs, so that in case the aggregate amounts to more than half the value of the vessel, the loss may be converted from a partial loss to a constructive total loss; but in them all the rule is strictly confined to general average, technically defined, as accruing by a voluntary sacrifice made by the master in the management of the vessel in the prosecution of her navigation; and in all, the distinction between such losses and those consisting in the expense of raising a sunken vessel and taking her to the nearest port for repairs is maintained and affirmed, as established in the cases of *Sewall vs. U. S. Ins. Co.*, 11 Pick., 90, and *Ellicott vs. Alliance Ins. Co.*, 14 Gray, 318, which are never questioned.

Neither are the cases last named opposed by any decision of the Supreme Court of the United States. On the contrary, as has already appeared, they are in exact harmony with the principles affirmed and applied in *Bradlie vs. Maryland Ins. Co.*, 12 Pet., 378; and there is no conflict between that and the case of *McAndrews vs. Thatcher*, 3 Wall., 347. In that case the contest was between the owners of the ship and of the cargo as to the liability of the latter to contribute towards expenses alleged to have been incurred after the accidental stranding of the vessel for the joint benefit. The judgment of the court against the claim of the plaintiffs for the contribution was upon the ground that "there was no community of interest remaining between the ship and the cargo, when the master, as declared in

the statement of the case, abandoned the ship and left her in charge of the agent of the underwriter, after the consignees of the ship had declined to authorize the master to incur any further expense." As elsewhere stated in the opinion in that case, the settled rule is (page 367) "that when a vessel is accidentally stranded in the course of her voyage, and by labor and expense she is set afloat, and completes her voyage with the cargo on board, the expense incurred for that object, as it produced benefit to all, so it shall be a charge upon all, according to the rates [rules?] apportioning general average." And again (page 371), it is stated to be a case of general average contribution between ship and cargo, "provided the ship and cargo were exposed to a common peril, and the whole adventure was saved by the master in his capacity as agent of all the interests, and by one continuous series of measures." But even as regards such expenses, which, in case the whole adventure is saved, would be apportioned according to the rules of general average among all the interests benefited, in case of abandonment of the ship, justified by the actual result, they are thrown upon the underwriter as part of the loss, with the right to compel contribution at his own risk. 2 Pars. Mar. Ins., 289. And Mr. Parsons adds (page 291) :—

"This rule has been held applicable, even if it would give to the insured the power of making his loss partial or total at his pleasure. By an American rule, as we see more fully elsewhere, a loss of more than one half may be made a constructive total loss by abandonment. Now, if an insured loses by jettison of his goods sixty per cent, and is entitled to receive half of this by way of contribution in general average, and the circumstances are such that he can receive this if he will, the rule above mentioned would give him the right to choose between recovering his contribution and claiming a partial loss of thirty per cent, and transferring this claim to the insurers and abandoning his salvage of forty per cent, demanding of them as for a total loss."

And he adds, notwithstanding the objection of its apparent inequality, that the cases cited show that this rule may perhaps be considered as now an established part of the law of marine insurance, with all the consequences that may result from it.

Where, as in the present case, the expenses of relieving the stranded vessel and taking her into port for repairs are incurred after abandonment, and by the underwriters, they are incidental to the restoration of the vessel, and necessarily go into the account which determines whether the cost of restoration exceeds half the value of the vessel, and consequently whether the owners were justified in abandoning and claiming for total loss; and although, in such cases, when cargo as well as ship are saved by the expenditure

in raising the vessel and taking her into a port of safety, the expenses are to be ratably shared by the interests benefited, upon the principles of general average, it is a case rather of a claim by a stranger to the cargo for salvage for its rescue, than of a general average loss, to be adjusted between ship and cargo for sacrifices made by the master of the former in the performance of his general duty to both.

And in this view a distinct defense is based on the suing and laboring clause. The argument is that the expenses of recovering the property from peril authorized by that clause are agreed to be borne by the parties, the insurers and insured, in proportion to their respective interests, for which share each is bound to the other absolutely, whether the result be successful or not; and that the construction of the abandonment clause, which justifies the plaintiff's claim, deprives the suing and laboring clause of its true significance. The language of the clause in question is that, "in case of loss or misfortune, it shall be lawful and necessary to and for the assured, etc., \* \* \* to make all reasonable exertions in and about the defense, safeguard, and recovery of the said vessel, etc., without prejudice to this insurance, etc., and in case of neglect or refusal on the part of the insured, etc., then the said insurers may and are hereby authorized to interpose and recover the said vessel, or after recovery to cause the same to be repaired, or both, for account of the insured, to the expenditures and amount whereof the said insurance company will contribute according to the proportion the sum insured bears to the valuation aforesaid, and the surplus, if any, paid to or incurred by said insurers,—with the premium note, if unpaid,—shall be a lien upon and shall be recoverable against the said vessel, etc.; but in case this insurance shall be against total loss only, and no claim for the same be sustained, then the whole of said expenditures and amount paid or incurred by said insurers shall be a lien, and recoverable as aforesaid," etc.

It was further agreed, in the clause first quoted, that the acts of the insured or insurers in recovering, saving, and preserving the property insured, in case of disaster, shall be without prejudice to the rights of either, and shall be considered as done for the common benefit. There is nothing, therefore, in the suing and laboring clause which, according to the express agreement of the parties, can be construed as affecting the right of the assured to abandon. In pursuance of the terms by which that right is defined and limited, the very object of the suing and laboring clause was to enable each

party to do what was best for both, without prejudice to either; and it contains no obligation on the part of one to refund any expenditure made by the other, except according to their respective interests. That is to say, if the loss is partial only, then the expenses incurred are to be borne by each in proportion to the interests covered by the policy, and those at the risk of the owners. But if the loss, under the terms of the policy, is a total loss, whether actual or constructive, any expenditures made by either constitute a part of the loss, and as by the abandonment the whole interest in the subject of the insurance vests in the insurer, the whole expense falls upon him, without recourse upon the insured. An abandonment, either accepted or justified by the event, executes in full the contract between the parties as of its date, so that no new rights can be acquired by either against the other without further assent. Expenses incurred after that by the insurer are contracts upon his own account alone and for his own interest.

The conclusion is, therefore, that the several plaintiffs are entitled to recover, according to their claim for a total loss, the whole amount of the insurance, less any set-off for unpaid premium. Judgment will be entered accordingly.

## SUPREME COURT OF GEORGIA.

COTTON STATES LIFE INS. CO.

vs.

EDWARDS, ADMINISTRATRIX.\*

Continuance of cases on account of absence of counsel are not favored, and absence without leave to attend other trials is no good ground for such continuance.

Objections must be made, if leading questions, or proving by parol of writings without proof of loss, or inaccessibility of originals, are to be ruled against.

Representations as well as acts of an agent within his authority are binding on the principal.

It would seem that where a policy had been commuted for a proportional paid-up according to its terms with an indorsement that it was valid for such proportion subject to its creditors, the contract was fully executed, and the insured would be exempt from a provision against going into the torrid zone.

Where a discrepancy as to age appeared from the application and proofs and the company with knowledge of a violation of the provision as to residence accepted and declared the proofs satisfactory, this was a waiver of the misstatement as to age and of the violation. An error as to age in proofs may be explained.

In a statute provision regarding the liability of a company for refusing to pay a claim in bad faith, the term bad faith does not mean fraud, but simply frivolous or unreasonable grounds.

A refusal of the company to pay on grounds which were not set up in court but where the actual defense was ground which had already been waived, it was bad faith within the statute.

Mrs. Emma C. Edwards, administratrix of her husband, H. S. Edwards, deceased, sued the Cotton States Life Insurance Company on a policy of insurance on the life of the deceased for \$5,000.00, Plaintiff also alleged a demand and refusal to pay in sixty days in bad faith, and claimed damages and attorney's fees. The defendant pleaded:—

1. The general issue.

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\* Decision rendered Oct. 21, 1934.



2. That the assured represented his age to be less than the proofs of death showed, whereby he paid a less premium, etc.

3. The proof of death showed the assured had violated the clause in the policy inhibiting him from passing into the torrid and frigid zones, by passing into the torrid zone, and going from San Francisco to Australia.

4. That, if defendant owed anything on the policy, it was not \$5,000.00, nor any of the sums demanded, but only \$789.46, having never made but two payments of premiums—one, when the policy was issued, and the next, one year thereafter, neither of which was a full year's payment, the full year's premium being \$198.15, and the payment being \$132.15, leaving \$66.00, with interest thereon, due each of the two years, and paid nothing from then till his death, nearly nine years thereafter. Bad faith was denied.

It is unnecessary to detail the evidence further than to state that the policy and two premium notes were put in evidence, and plaintiff testified that she made the proofs of death and demanded payment; that Obear, the secretary of defendant, both verbally and in writing, said that the proofs were all right, and admitted the claim, but said that the company could not pay because of a notice, which had been served on him by certain attorneys not to pay it; that after obtaining letters of administration, she demanded payment, but it had not been made. There was also evidence as to the value of attorney's fees. The other material facts are stated in the decision.

LANIER & ANDERSON, *for Plaintiff in error.*

HILL & HARRIS, *Contra.*

HALL, J.

That continuances of causes on account of the absence of counsel are not favored, has been more than once decided by this court. Such excuses should be discountenanced. It is the duty of counsel to attend, and their failure to do so, is no cause for postponement, unless in cases of necessity or misconception. Such were the distinct declarations of this court in *Allen vs. State*, 10 Ga. 85, and these rulings have been since followed.

Both the counsel in this case were absent without leave, and without notification to the court. One was attending to a case in this court, from a circuit, other than that in which this cause was depending—and the other, to a case in the circuit court of the United

States, sitting at Savannah. This case was set on Saturday, under the rules of the Superior Court of Bibb County, to be heard on the following Tuesday. The counsel had notice that a session of the court would be held on Saturday for sitting cases; and from the record it appears that one of them knew that the case was then set to be heard on Tuesday. He was suddenly and unexpectedly called away to attend a case in this court. He wrote to the judge, asking protection, as to another case set for the same day, but said nothing about this. Here was no necessity or misconception. The counsel may possibly have believed that the case would not be reached, or if reached, would not be tried, until later in the term. This belief was not induced by any announcement of the court, or any consent or agreement of the opposite party or his counsel, and without some such cause, afforded no ground for a new trial, 63 Ga., 428. If counsel take the risk of having the case called and tried in his absence, this also is no ground for a new trial, 69 ib., 767. Absence without leave to attend trials of cases pending in other courts, is no ground for the continuance of causes, 66 ib., 344; 38 ib., 491; 10 ib., 85; nor is such absence, to attend the legislature, when counsel is a member of that body, 31 ib., 35, or to meet "other engagements," 21 ib., 6. Upon each of these several subjects. See 66 ib., 157; 61 ib., 419; 65 ib., 466. *Poppell vs. State*, September term, 1883—nor does it make any difference that the absent counsel has in his possession papers material to the case. *Hook vs. Teasley*, February term, 1884, and cases cited.

The presiding judge, after endeavoring to get plaintiff to consent to a postponement of the cause, and failing so to do, ordered it to trial, holding that the voluntary absence of counsel to attend to a case in the supreme court, not from the circuit in which he resided, was not a legal showing. We agree with the judge, that if any other rule should prevail, the judges of the superior courts would, in many instances, be powerless to transact the business of their circuits, as the supreme court is in session most of the time, and eminent counsel are not unfrequently employed in cases pending there, from several different circuits. Be this, however, as it may, the judges of the superior courts are necessarily entrusted with discretion, as to the continuance of cases for the term, or the postponement of their hearing to another period, during the same, and unless such discretion is flagrantly abused in overruling a showing for a continuance that comes fully up to the requirements of the law, we do not feel authorized and empowered to interfere with its exercise,

and will never do so, unless some legal right of the party making the showing has been invaded or withheld, and injury or injustice has been thereby done.

When the postponement asked is matter of indulgence and favor, and not of right, we are powerless to interfere. *Clay vs. Barlow*, decided at this term.

2. Other grounds of the motion for new trial relate to leading and improper questions propounded to the plaintiff, while on the stand, as a witness—especially as to the contents of certain letters said to have been written by and the verbal admissions of the secretary and treasurer of the defendant company, and also to like testimony from another witness examined in the cause. We might dispose of these exceptions by holding that leading questions were asked, and the contents of writings, which had not been shown to have been lost, or which were inaccessible, were given in evidence without objection. It is true, the defendant was not represented, and had no opportunity of urging such objections; but it was its own fault that it was not. Its counsel should have been present, and urged these objections, if, in fact, there was any foundation for them. But waiving this, there was no such error in this respect as hurt the defendant, or as would necessarily have brought about a different result from that reached. Whether leading questions are to be allowed, is largely in the discretion of the court. The right to do so may be granted to the party, calling the witness, and refused to the opposite party, "when from the conduct of the witness, or other reason, justice requires it" (code 3,866), and this discretion will not be controlled, except in extreme cases, although the witness called may be opposite party to the case. *Cado vs. Hatchet*, February term, 1884.

The oral testimony of the contents of written papers, to which exception is taken, relates to two subjects; the acknowledgments of the receipts of the proofs of the death of the insured, and the satisfaction of the company with the sufficiency of the same, as expressed in a letter from its secretary and treasurer to the plaintiff, and to her written demand upon the defendant for payment of the amount admitted to be due on the policy. The letter relating to the first appears at full length in the record, and it is therein stated that the demand, which was exhibited in court, was also admitted in evidence—that it is not set out in full so that this court can judge of its extent, is not the fault of the plaintiff, but of her opponent, who made the motion for a new trial, and whose duty it was to accompany

it with a brief of the oral and copy of the documentary evidence had on the trial. In the absence of anything to the contrary, the court must presume that it was a legal and proper demand for the amount really due on the policy. It is incumbent upon the party alleging error to show it.

As to the objection that the admission of the secretary and treasurer of this company, in the transaction of this business, did not bind it, we can only say that, from other proof in this case, he was its agent, fully authorized to act in its behalf; what he did was within the scope of his authority, and the company is not only bound thereby, but by all the representations made by him in that business, code 2,494, 2,499. Indeed, this company could only act by its agent; he is in this respect, if not the company itself, its alter ego.

The remaining grounds of the motion for a new trial, are that the verdict is contrary to law and evidence, and that the court erred in certain charges given to the jury. Under these grounds it is insisted that the plaintiff was not entitled to recover, because, first, the insured had, during the existence of the contract, gone into the "torrid zone," in violation of one of its express stipulations—and secondly, because he had, in his application for insurance, misrepresented his age by making himself out a year younger than the death proofs showed that he was—and thirdly, because there was no evidence to support the finding of \$100 counsel fees as damages—there being no "bad faith" shown by the company in withholding payments of the amounts admitted to be due on the policy.

We do not think either one of these points was tenable. As to the first, it was shown that the policy was issued on the 16th day of April, 1872. One of its conditions was, that if it was "terminated by the non-payment of premiums, and for no other cause, after two full years' premiums had been paid, then it should be valid for as many tenth parts of the sum insured as there should have been annual premiums paid." For two years the insured paid these premiums, and at the end of that time he made default, and on the 27th day of ——— (presumably April, as the premiums fell due on the 16th day of that month), 1874, the company, by its secretary, indorsed thereon :

\$1,000. This policy is valid for two tenths of the amount insured, subject to the terms and conditions of the policy."

(Signed)

"GEO. S. OREAR, Sec."

It appeared that this certificate was given prior to the insured going into the "torrid zone" without the permission of the com-

pany. This occurred in 1877, as was shown by the proofs of death, which according to the pleadings and proofs in the case had been submitted to the company.

While we are strongly inclined to the opinion that this defense was unavailable and that the policy as to the condition in question had been fully executed, and that the company had no further control over the actions of the insured in this subject, or in others of similar import, we will not finally determine it, as the exigencies of the case do not demand its decision. It is enough to say that after it had full knowledge of the fact, the company deliberately expressed its satisfaction, and promised to pay the amount due on the policy. It had the same knowledge as to the discrepancy in the age of the insured, as it appeared from the application for the policy, and the proofs of the death, and in this case, as in the other, it expressed satisfaction with the proofs, and promised payment. This conduct on its part was a waiver of the forfeiture claimed to result from a failure to comply with both conditions. 81 N. Y. R., 410; 75 Ill., 426; 39 Mich., 51; 53 Wis., 585. It is due to the plaintiff to state that she fully explained this discrepancy as to age in her evidence. She made out the proofs of death, and as to age, it is more likely she was mistaken, than that the insured himself was. At all events it would be going very far to conclude from this alone that the "declaration of this statement," made in the application for the policy, was "fraudulent or untrue" to such an extent as would authorize the court to vacate it entirely. An error in stating the age in the proof of death is explainable. 42 N. Y. Super. Ct., 259.

4. The only remaining question under this head is as to the award of counsel fees by way of damages. This was proper, unless it was made to appear to the satisfaction of the jury that the refusal of the company to pay the loss was not in "bad faith." Code 2,850. What is "bad faith," as used in this statute? Is it the exact equivalent of "actual fraud," as was contended by the learned and able counsel for the defendant, or is it descriptive merely of some device or excuse, resorted to by insurance companies to hinder and delay the insured in the collection of his loss? Both the object of the law and the terms in which it is expressed would seem to concur in attaching to the term the latter signification. It provides that in all cases where a loss occurs, and the companies refuse to pay the same within sixty days after a demand shall have been made by the holder of the policy on which the loss occurred, they shall be liable

to pay him, in addition to such loss, not more than twenty-five per cent on their liability for such loss, and also all reasonable attorney's fees for the prosecution of the suit for the recovery of the same, unless it shall be made to appear to the jury trying the same that such refusal to pay was not in "bad faith."

The purpose of the law was evidently to force prompt payment of such losses after the lapse of a reasonable time to enable the company to ascertain any good ground existing for not meeting the demand, and if no such cause existed for refusing a compliance with the demand, and they still persisted in refusing to respond, then they did so, subject to the further claim for the damages named. That such has been the meaning of the term "bad faith" as here used, in the apprehension of this court, we think is apparent from two cases—the one in 55 Ga., 110-111, and the other in 63 ib., 205. In the first case, the company promptly refused to pay the demand for two reasons. First, because the insured had not paid the premiums as provided by the policy; and secondly, because he had died by his own hands in violation of its express conditions. The jury found a verdict for the plaintiff with damages and counsel fees, which was set aside, and a new trial ordered. This court refused to disturb the judgment, awarding the new trial, holding that there was no evidence to show that the suit was not defended by the company in good faith. In the other case it is said, "Where the highest courts of the country have differed in respect to the construction of a contract, and in this State the principle, though hinted at, had never been settled, it cannot be that to test the question here is in bad faith." The meaning of the term in question is, as we think, negatively and impliedly, though not positively and affirmatively, fixed by these decisions as being any frivolous or unfounded refusal in law, or in fact, to comply with the requisition of the policyholder to pay according to the terms of his contract, and the conditions imposed by statute.

Tested by this rule, there was sufficient evidence to justify the finding of counsel fees in this case. The company by its accredited agent, had expressed satisfaction with the proofs of death furnished, these afforded evidence that the insured had gone into the torrid zone without its consent, and also showed that alleged discrepancy as to age in the application and in the proofs of death, with a full knowledge of these facts it had promised payment of the loss when an administration should be obtained upon the estate of the insured—indeed it urged this to be done, and when it was effected it still

withheld payment, alleging that it had been notified by one who claimed to be a creditor of the insured, not to pay over the amount to the administratrix. It abundantly appeared that this was a mere pretext for refusing payment. It did not rely on this to resist the demand, but when suit was instituted, set up as an answer to the suit, the very defenses of which it had been apprised, and which it had deliberately abandoned. The plaintiff had incurred expenses about the bringing of this suit, and by taking other steps necessary to enable her to receive the money of which the company was fully apprised, and which it appears to have sanctioned, if it did not require. Surely there was enough to justify the inference that this defense was made in "bad faith," in the sense of that term as used in the statute.

The plaintiff showed cause against this motion for a new trial, as she was authorized under our practice to do (48 Ga., 21), and her showing, among other things, sets forth fully the correspondence between herself and the secretary of this company which makes an irresistible and conclusive reply to its defense. A new trial if ordered, could not result in a more favorable verdict to the defendant. The probability is that it would be less favorable. Then why disturb this finding in the face of the well-settled rule that this will never be done unless there ought to be another hearing that would probably eventuate differently from that already had. 46 Ga., 432; 52 ib., 145; ib., 354; 45 ib., 28.

Judgment affirmed.

SUPREME COURT OF INDIANA.

*Appeal from the Marion Superior Court.*

SUPREME LODGE OF K. OF P. }

vs. }

CLARA B. SCHMIDT, ET AL.\* }

It was claimed by defendant that the insured had failed to pay an assessment and was not therefore in good standing. The plaintiff beneficiary insisted that the notice of assessment had not been received. An offer of evidence of admission by the insured that he had received the notice and had failed to pay, was refused on the ground that it was not admissible to abridge the right of the beneficiary already acquired.

*Held*, That the reserved power of the insured to alter the beneficiary, which was not exercised, did not take the case out of the well-established rule that such evidence is inadmissible against the acquired rights of third parties.

*Held*, That the alleged admission being in connection with an application for re-instatement, was not a part of the res geste.

Regulations of mutual benefit societies must be construed liberally to effect the objects of their organization.

NIBLACK, J.

Action by Clara B. Schmidt, Cora Walton and Bertha Schmidt, against the Supreme Lodge Knights of Pythias of the World, upon the following certificate, issued on the 11th day of December, 1878:

No. 4,017.

First Class, \$1,000.

CERTIFICATE OF MEMBERSHIP.

*Endowment Rank of the Order of Knights of Pythias.*

This certifies that Brother Louis Schmidt has received the endowment rank of the Order of Knights of Pythias in section No. 3, and is a member in good standing in said rank, and in consideration of the representations and declarations made in his application,

\* Decision rendered September 17, 1884.



bearing date of December 2d, 1878, which application is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said endowment rank of all assessments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of one thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Clara B. Schmidt, as directed by said brother in his application, or to such other person or persons as he may subsequently direct by will or otherwise, and entered upon the records of the supreme master of exchequer, upon due notice and proof of death, and good standing in the rank at the time of death and the surrender of this certificate.

Provided, however, that if at the time of the death of the said brother there shall be less than one thousand members in this class, there shall only be paid a sum equal to one dollar for each member in good standing in this class. And it is understood and agreed that any violation of the within-mentioned conditions, or the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said supreme lodge shall not be liable for the above sum, or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Knights of Pythias of the World.

[L. S.]

D. B. WOODRUFF,

Attest,

Supreme Chancellor.

JOSEPH DOWDALL, Supreme Keeper of Records and Seal.

The complaint averred full compliance with all the conditions of the certificate on the part of the said Louis Schmidt, as well as the plaintiffs, and the death of the said Louis on the 18th day of February, 1880.

Cora Walton and Bertha Schmidt were made co-plaintiffs with their mother, Clara, who was the widow of said Louis Schmidt, upon the ground that in the application for, as well as in the certificate as originally issued, they were made beneficiaries jointly with her.

Issue, trial by jury at special term, verdict for the plaintiffs, assessing their damages at \$1,117.80.

New trial denied and judgment on the verdict. Appeal to the general term and judgment affirmed.

We herewith set out two sections of the constitution of the order which were read in evidence.

"Sec. 4. Upon receiving from the S. M. of E. notice of an assessment, he shall immediately forward the same to that officer, and give notice to each member of the class in which the assessment is made in the prescribed form, and notify him to pay the assessment within thirty days."

"Sec. 1. Upon receiving notice of an assessment, each member shall at once pay the amount to the secretary and treasurer of the section to which he belongs. In case any member neglects for thirty days after date of notice to pay said assessment, he shall stand suspended from that class of the endowment rank for which said assessment was made, and shall forfeit all claims upon the endowment fund belonging to said class, and the fact of said suspension shall be reported to the supreme master of exchequer in the monthly report; provided, that any member thus suspended for non-payment of assessment shall have the privilege of regaining all his rights as a member of the section in said class within three months by passing a new medical examination, and paying all the assessments that may have accrued up to that time. But when three months shall have elapsed from the date of suspension, he shall be required to pay in addition to the assessment that may have accrued during the first ninety days after such suspension, the sum of two dollars, pass a new medical examination, and then be re-admitted by a two-thirds vote of the members of the section present when the application is made. All re-instatements in accordance with this section shall be reported to the supreme master of exchequer by the secretary and treasurer in his monthly report. The provision of this section shall apply to all members now under suspension."

The endowment rank constitutes the life insurance department of the Order of Knights of Pythias extending over the entire United States, and at the time of the trial there were over twenty thousand members of that rank holding life insurance policies, or certificates of membership as they are usually called. John B. Stumph was at the time the certificate in this case was issued, and continued thereafter to be, the supreme master of the exchequer or treasurer of the rank, residing and keeping his office in the city of Indianapolis.

His principal duties were to receive from subordinate lodges, notices of the deaths of members, to make and to notify all members of assessments which had been made, to collect the money due upon assessments, to keep suitable books and to pay to beneficiaries the amounts which fell due upon policies issued to members.

It was his custom after receiving notices of the deaths of a suffi-

cient number of members of the rank to make it necessary, to notify all the surviving members of such death by postal cards directed to their places of residence respectively by mail, and in this way, to require them to pay an assessment of \$1.10 each, within thirty days after the date of the notices, which were usually sent out some days in advance of the date.

Between the 11th day of December, 1878, and the latter part of June, 1879, Louis Schmidt, who also resided in the city of Indianapolis, received, by postal cards addressed to him through the post office, notices of seven assessments of \$1.10 each, all of which sums were paid by him in due time. About the 20th day of this last named month, another assessment of \$1.10 was made against him, known as assessment No. 8, payable within thirty days after the first day of the ensuing month. This assessment was not paid, and in consequence he was, on the 1st day of August, 1879, by an appropriate entry on the books of Stumph's office, declared to be suspended from his class in the endowment rank. A few days before this entry of suspension was made, Schmidt received notice of another assessment for \$1.10, known as No. 9, payable within thirty days after said first day of August, 1879.

On the 18th day of that month, Louis Schmidt, being then a hopeless invalid, and absent from home, his wife, Clara B. Schmidt, went to the office of the supreme master of exchequer for the purpose of paying said assessment No. 9. Stumph declined to receive the money upon that assessment, upon the ground that Schmidt had since the notice was sent out, been suspended from the rank, for non-payment of assessment No. 8. Mrs. Schmidt thereupon offered to pay assessment No. 8, as well as No. 9, but Stumph refused to receive any money upon either assessment, informing her that her husband could only be re-instated, by submitting to, and satisfactorily passing, a new medical examination. Two or three days after this occurrence, Schmidt returned to his home, and, presumably acting upon information communicated to him by his wife, went with Nicholas Hanson, president of the section of the endowment rank in question, to Stumph's office for the purpose of taking measures for his re-instatement in the position from which he had been suspended, but did not succeed in being so re-instated.

At the trial the controlling question became, and was, whether Schmidt had received notice of assessment No. 8, which he had failed to pay within the time required. Stumph testified that he had

either on the 20th or 21st day of June, 1879, deposited in the post office at Indianapolis, properly addressed to Schmidt at his particular place of residence, a postal card containing notice of the assessment in controversy.

Mrs. Schmidt in her testimony, claimed that owing to her husband's very bad health, she had attended to, and had principal charge of, nearly all his business during the Summer of 1879, including the reception of his mail matter, and that neither she nor her husband had ever received any notice of assessment No. 8. In that respect she was materially corroborated by her daughter Cora, who was also a witness in the cause. Mrs. Schmidt further claimed that her attention had been particularly directed to the matter of the assessments against her husband, and that she had never heard of the assessment known as No. 8, until she called at the office of the supreme master of exchequer to pay assessment No. 9, as herein above stated. Hanson was also called as a witness and counsel for the defendant offered to show by him that between the twenty-first and twenty-fifth days of August, 1879, he accompanied Schmidt, the decedent, to the office of the supreme master of exchequer at the time he went to see about getting re-instated, and that he, Schmidt, there admitted in the presence of Stumph, that he had received notice of assessment No. 8, in contest, and that he had not paid that assessment, and that he had been suspended for its non-payment : also that for the purpose of assisting Schmidt to be re-instated, he, witness, as president of the rank in which the suspension had occurred, went with him to the medical examiner's office, where he submitted to an examination and was rejected.

But the court excluded the evidence thus offered for the alleged reason that no admission which the decedent might have made at the time indicated, was admissible in abridgment of any right which the plaintiffs had already acquired in the certificate in suit.

If this action had been upon an ordinary life insurance policy, the decision of the court excluding what was proposed to be proven by Hanson would have been fully sustained by the authorities. *The F. M. Life Ins. Co. vs. Applegate*, 7 Ohio St., 292. *The Southern Life Ins. Co. vs. Booker*, 9 Heisk., 606 ; *Washington Life Ins. Co. vs. Haney*, 10 Kansas, 525 ; *Ranks vs. The Am. Mut. Life Ins. Co.*, 27 N. Y., 282 ; *Mulliner vs. Guardian Mut. Life Ins. Co.*, 1 Thompson and Cook (N. Y. S. C. R.), 448 ; 2 Phillips on Insurance, 626 ; sections 2,058, 2,059 2,060 ; *Pence vs. Makepeace*, 65 Ind., 345 ; *Wilburn vs. Wilburn*, 83 Ind., 55 ; *Harley vs. Heist*, 86 Ind., 196.

This is conceded by counsel for the appellant, but it is insisted that the provision in the certificate before us, authorizing Schmidt to make a different disposition of the proceeds by will or otherwise, takes it out of the rule applicable to ordinary life insurance policies recognized as above, and requires us to consider Schmidt as having been the real owner of the certificate until the time of his death : that Schmidt being thus the real owner of the certificate, at the time fixed in the offered evidence, it was competent to prove admissions made by him affecting its validity as a chose in action. The cases of *Durian vs. Central Verein*, 7 Daly, 168; *Richmond vs. Johnson*, 28 Minn., 447; *Swifts vs. R. P. and F. C. Benefit Association*, 96 Ill., 309; *Ballou vs. Gile*, 50 Wis., 614; *Hutson vs. Merrifield*, 51 Ind., 24, and others, are cited as in principle sustaining this position.

But the precise point involved here was not ruled upon in any of those cases, and the facts in all of them were so essentially different from the facts upon which this case rests, as to render them practically valueless as precedents upon the question under discussion.

From the time of the insurance of the certificate until Schmidt's death, Mrs. Schmidt and her co-appellees (she legal, and they equitable) were in legal contemplation, the owners of it, subject only to the right of Schmidt to ultimately substitute other beneficiaries, by will, or in such other manner as the rules and regulations of the order might permit.

But this right to ultimately substitute other beneficiaries did not empower Schmidt to destroy the value of the certificate in the hands of the appellees by merely hearsay or irrelevant admissions concerning matters in issue between other parties. Schmidt having never exercised the right of substitution reserved to him, we are justified in assuming that he never intended to exercise it, and that, as between the appellees and the order, the former have been the absolute owners of the certificate ever since it was issued. We are consequently unable to hold that the alleged admissions of Schmidt to Hanson, in the presence of Stumph, were any more admissible as evidence in the case in hearing than they would have been in an action upon a life insurance policy issued in the usual form. It is further insisted that the excluded evidence ought in any event to have been admitted as a part of the *res gestæ*, and that for that reason, if for no other, the court erred in its exclusion.

In response to this claim it is sufficient to say that at the time Schmidt visited Stumph's office in company with Hanson, the appel-

lant had ceased to recognize him as a member of its endowment rank, and had declined to accept payment of assessments No. 8, as well as No. 9, made against him, upon the theory that the certificate of his membership held by Mrs. Schmidt had become inoperative and void as an obligation resting upon the order. Whatever, therefore Schmidt may have said in connection with his application for re-instatement in his former position, was said in connection with, and as part of a new transaction, and hence was as to such new transaction only a part of the *res gestæ*.

The admissions of Schmidt sought to be introduced in evidence were in consequence not competent as a part of *res gestæ* in connection with the non-payment of assessment No. 8, to which the appellant designed such admissions should apply.

In action upon life policies or certificates of membership issued by mutual societies designed to secure the payment of money to those dependent upon its members after the death of such members, courts should construe the rules and regulations of such societies liberally to effect the benevolent objects of their organizations, and that doctrine of construction is applicable generally to rulings on questions of evidence as well as in other respects. *Ballou vs. Gile*, supra ; *Edmans vs. Mut. Ins. Co of the Order of Herman's Sons of Wisconsin*, 44 Wisconsin, 376. Other questions were reserved at the trial and argued here, but what we have said practically disposes of all remaining questions adversely to the appellant.

The judgment below at general term is affirmed with costs.

## SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1883.

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From Barbour Circuit Court.

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MOBILE LIFE INS. CO. }

vs. }

WILLIAM H. PRUETT.\* }

Suits against a corporation, foreign or domestic, may be maintained when in its nature the cause of action is transitory, founded upon a matter or transaction which might have taken place anywhere, in any county in which the company transacts business by agents, without regard to its proprietorship of real estate, or its principal place of doing business.

In insurance contracts, the time of payment is material, is of the essence of the contract, and non-payment at the day appointed involves absolute forfeiture of the policy.

Where premiums are not payable at stated times, but on the demand of the company, the assured is not bound to take notice when the payment is payable, but can await notice of that fact from the insurer; and where the place of payment is not that appointed in the policy, but is transferred to a point at or near the domicile of the assured, payment of the premium may be made to an agent, upon any receipt the assured chooses to take, though he does not obtain a receipt signed by either of the designated officers of the company.

Where a contract is reduced to writing, the written memorial becomes the sole expositor of its terms; all antecedent negotiations, agreements or understandings, are merged in it, and to vary or contradict it, evidence of them is not admissible, unless it be clearly shown that a party was by fraud induced to enter into the contract, or that by mistake the intention of the parties is not expressed, and a policy of life insurance is within this conservative principle.

A receipt of a premium, after a breach of the condition for its payment has occurred, is doubtless a waiver of the forfeiture, but the payment must be made to the insurer, or to an agent having authority to receive it, and it must be made fairly and honestly, without any misrepresentation or con-

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\* From Alabama Law Journal.

cealment of material facts known to the party making the payment, of which the insurer cannot reasonably be presumed to have knowledge.

BRICKELL, C. J.

The demurrers to the pleas in abatement were properly sustained. A suit against a corporation, foreign or domestic, may be maintained, when in its nature the cause of action is transitory, founded upon a matter or transaction which might have taken place anywhere, in any county in which the corporation transacts business by agents, without regard to its proprietorship of real estate, or its principal place of doing business. Pamph. Acts, 1878-79, p. 197; *Home Protection Ins. Co. vs. Richards*, MSS.

The policy of life assurance upon which the action is founded, "is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character." *New York Life Ins. Co. vs. Statham*, 93 U. S., 24. Speaking of a similar policy, it was said in *Brooklyn Life Ins. Co. vs. Bledsoe*, 52 Ala., 551: "The policy by its terms is forfeitable, is to cease and determine, and the insurer to be freed from all liability, if the annual premiums were not paid when they became due and payable. The continuance of the policy as a contract—its life—depended on the prompt payment of the premiums. The payment was manifestly the condition precedent, on which the parties respectively stipulated for its continuance, and on the non-performance of which they assented to its extinction." There are many authorities holding that by the payment of the first premium an insurance for one year is obtained, with a right to its continuance from year to year during life upon the payment of the stipulated premium. The subsequent payments rest in the option of the assured, and "payment ad diem is, therefore, a condition precedent to continuous liability of the insurers." In the case first referred to, and in subsequent cases, the Supreme Court of the United States have rejected the theory that the condition is precedent, declaring it subsequent, and we prefer to follow its decisions upon this point. All the authorities agree that the time of payment is material, is of the essence of the contract, and non-payment at the day appointed involves absolute forfeiture, when, as in the present case, such are the express terms of the contract. *New York Life Ins. Co. vs. Statham*, *supra*. The stipulation of the policy is not only for the



payment of the premiums at times stated, but the place of payment (the office of the company in the city of Mobile), is appointed, unless payment is made to an agent of the company, producing a receipt signed by the president, vice-president or secretary. The verbal agreement of which the circuit court received evidence, made with Fowler, the agent of the company soliciting the insurance, through whom the application for the policy was forwarded, is in direct violation and contradiction of these clearly expressed terms of the policy, and if it is of validity, changes the legal effect of the contract, and the duties and obligations of the insurer and the assured. The premiums are not payable at stated times, but on the demand of the company; the assured is not bound to take notice when the premium is payable, but can await notice of the fact from the insurer. The place of payment is not that appointed in the policy, but is transferred to a point at or near the domicile of the assured; and payment may be made to an agent upon any receipt the assured chooses to take, though he does not obtain a receipt signed by either of the designated officers of the company.

When a contract is reduced to writing, the written memorial becomes the sole expositor of its terms; all antecedent negotiations, agreements or understandings are merged in it, and to vary or contradict it, evidence of them is not admissible, unless it be clearly shown that a party was by fraud induced to enter into the contract, or that by mistake the intention of the parties is not expressed. *Mead vs. Steger*, 5 Port., 489; *Paysant vs. Ware*, 1 Ala., 160; *Hair vs. La Brouse*, 10 Ala., 548. A policy of life insurance is within the influence and operation of this conservative principle, and the presumption is conclusive that in it all prior verbal negotiations or agreements, or arrangements are merged. It is usually prepared with much care, for the purpose of embodying the entire agreement of the parties—to withdraw from the uncertainty of parol evidence all the terms and conditions of the contract, and the rights, duties and obligations of the respective parties, that future controversy may be avoided. The amount of the premium, when and where it is payable, the consequence of default in payment, the event upon which the principal sum is payable, and its amount, are all expressed clearly in the policy. It was issued after the verbal agreement of which evidence was received, and was, without objection, accepted and retained by the assured. The most painful uncertainty would attend such contracts, if it was not taken and accepted as the entire engagement of the parties, and all mere parol evidence of prior

agreements or negotiations, was not excluded. *Ins. Co. vs. Mowry*, 96 U. S., 547 ; *Thompson vs. Ins. Co.*, 104 U. S., 259. The evidence of the parol agreement imputed to the agent Fowler, before the issue and delivery of the policy, ought to have been excluded.

A contract in writing cannot be varied or contradicted by evidence of prior or contemporaneous inconsistent verbal agreements, but it may by parol agreements made subsequently be rescinded or modified, and to support the rescission or modification, no other consideration is necessary than the mutual agreement of the parties. The condition for the payment of the premiums at the times stated, and the place appointed, was inserted for the benefit of the company, and if a breach of the condition occurred, upon its election it depended whether advantage of it would be taken, or whether it would be waived. Or, before forfeiture, by a new agreement, express or implied, payment at the time and place fixed could be waived or dispensed with, and some other mode of payment substituted. There is often much of difficulty in the absence of written evidence of a new agreement ; when the agreement is to be inferred or implied from circumstances ; or dispensing or waiving a forfeiture, is matter of deduction from the acts or declarations of the parties ; in determining whether there has been a new agreement made, or there has been a dispensation or waiver of the forfeiture because of the failure to comply strictly with the requirements of the policy. The true test is, whether by the course of dealing with the accused, or by his acts or declarations, or by the acts or declarations of his authorized agents, the insurer has induced the honest belief in the mind of the assured, that the terms and conditions of the policy providing for a forfeiture if payment of the premiums is not made at the time and in the manner appointed, will not be enforced ; but that payment will be accepted, if made at another time or in another manner. Having induced such belief, if the assured in good faith relies upon it, intending to make payment in accordance with it, justice and morals forbid that the insurer should take advantage of a forfeiture that would not have occurred if he had not induced it. *Ins. Co. vs. Wolff*, 95 U. S., 326 ; *Thompson vs. Ins. Co.*, 104 U. S., 252 ; *Ins. Co. vs. Norton*, 95 U. S., 234 ; *Ins. Co. vs. Mowry*, *ib.*, 544 ; *Ins. Co. vs. Eggleston*, *ib.*, 572 ; *Phoenix Ins. Co. vs. Doster*, 106 U. S., 30. Excluding from consideration as we must, the antecedent verbal agreement, imputed to the agent Fowler, and no fact or circumstance is shown calculated to induce in the minds of the assured a reasonable belief that payment of the premiums in

any other mode, or at any other time, than that stated in the policy, would be accepted by the company. The acceptance of a note for the first premium, the subsequent extension of the day of its payment, was an arrangement in reference to that premium only, and unless a similar note had been taken for a subsequent premium, afforded no room for a belief that a like indulgence would be given as to the payment of such premium.

A receipt of a premium after a breach of the condition for its payment has occurred, is doubtless a waiver of the forfeiture. The payment must, however, be made to the insurer, or to an agent having authority to receive it. And it must be made fairly and honestly; there must be no misrepresentation or concealment of material facts known to the party making the payment, of which the insurer cannot reasonably be presumed to have knowledge. Passing all consideration of the fact that there is not probably legitimate evidence that Jernigan had authority to receive payments of past due premiums, waiving consequent forfeitures, the payment made to him was subsequent to the death of Mrs. Pruett, and after the assured had been informed that the policy was forfeited by the failure to pay the premiums according to its terms. This fact, and the death of Mrs. Pruett, were not communicated to Jernigan when he received the premium. It is not too much, probably, to say the inference is irresistible, that they were purposely concealed from him. When the death of the assured occurs, after a failure to pay a premium according to the terms and conditions of the policy, acts of an agent of the insurer done in ignorance of the death, which might otherwise constitute a waiver of the consequence resulting from the failure to pay the premium, are not of any effect. *Bliss on Life Ins.*, § 190.

We have not deemed it necessary to pass upon the numerous questions arising from the rather voluminous pleadings found in the record; there is no necessity for it, and no practical benefit could result from it. What has been said will enable the circuit court on another trial, to make a just and legal disposition of the case.

Reversed and remanded.

SUPREME COURT OF CALIFORNIA.

OLD SAUCELITO LAND AND DRY DOCK CO. }

VS. }

COMMERCIAL UNION ASSURANCE CO.\*

A general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they may think fit to liquidate damages, in their own nature unliquidated, and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it.

A policy of fire insurance was made subject to all the conditions and stipulations indorsed thereon, one of which was "that in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men \* \* \* whose award shall be conclusive and binding on both parties;" *Held*, That the submission to arbitration or a fair effort on the part of the insured to obtain it, was a condition precedent to his right to bring an action to recover his loss, where the amount thereof was in dispute between him and the insurer.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

P. G. GALPIN, *for the Appellant.*

T. C. VAN NESS, *for the Respondent.*

McKINSTRY, J.

The defendant, an English insurance company, insured plaintiff upon a certain building in Marin County, in a sum not to exceed one thousand five hundred dollars, and received the premium. The building was destroyed by fire.

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\* Opinion filed December 19, 1884. From *West Coast Reporter*.

The policy of insurance provided : "The capital stock and fund of the company shall be subject and liable to pay to said insured, his, or her, or their executors and administrators, all the damage and loss which the insured shall suffer by fire on the property hereinbefore mentioned, not exceeding, on each item respectively the sum hereinbefore declared to be insured thereon, and not exceeding the whole sum of fifteen hundred dollars, United States gold coin, but subject always to the conditions and stipulations indorsed hereon, and which constitute the basis of this insurance."

Among the conditions and stipulations indorsed were the following :—

"VIII. That persons insured by this company sustaining any loss or damage by fire, shall forthwith give notice of such loss, and shall, within a reasonable time, render an accurate and particular account of their loss or damage respectively, as the nature and circumstances of their respective cases will admit ; such account of loss to have reference to the value of the property destroyed or damaged, immediately before such fire, and shall verify the same by solemn declaration or affirmation, before a justice of the peace, and shall produce such other evidence as the directors of their agent may reasonably require ; and until such declaration or affirmation, account and evidence are produced, the amount of such loss or any part thereof, shall not be payable or recoverable. And if there appear any fraud or false declaration, or that the fire shall have happened by the procurement or willful act, means or connivance of the insured or claimants, he, she or they shall be excluded from all benefit under this policy.

"IX. That, in every case of loss or damage for which the said company shall be liable, the same, on being duly proved, and the accounts adjusted, shall either be paid immediately, or the company shall have the option, where the insurance may be on goods, to supply the insured with the like quantity of goods of the same sort and kind, and of equal value and goodness with those destroyed or damaged by fire ; or where the insurance may be on houses and buildings, the said company shall have the option, with all convenient speed, to rebuild, or repair, and re-instate the same, and put them into as good and substantial condition as they were in at the time when such fire happened.

"X. That, in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men, mutually chosen (who, in

case of disagreement shall select a third), whose award shall be conclusive and binding on the parties."

The plaintiff, in its complaint, after stating facts showing that a difference arose as the amount of loss, adds :—

"That the plaintiff thereupon, and on request of defendant, chose one S. M. Hill, and the defendant chose one A. A. Snyder, to whose judgment the plaintiff and defendant mutually submitted all differences of opinion between the plaintiff and defendant, resulting from or growing out of said loss, and all difference of opinion as to the amount of said loss, and said plaintiff notified said Hill to arbitrate said amount of loss. That said Hill and Snyder met to arbitrate said amount, but failed to agree upon the amount of said loss or any amount as due from defendant to plaintiff by reason of said loss, and failed to adjudicate upon any differences between plaintiff and defendant growing out of said loss—and failed to select a third person as provided in section X. of the conditions, annexed to the policy of insurance, to assist in determining said amount, and failed to make any award ; and thereupon said plaintiff, after waiting a reasonable time, withdrew from said arbitration and notified the defendant that it had so withdrawn, prior to the commencement of this action, and no award has ever been made." The answer denies these averments.

The court below found : "That no arbitrators were appointed or mutually chosen by the parties to this action to appraise, at its true cash value, or at all, the amount of loss or damage, and that the difference of opinion between plaintiff and defendant had not been submitted, as required by the tenth condition of the policy. That the plaintiff had at no time offered to submit such difference of opinion to arbitration, or take any steps to procure arbitration or award, and that the failure to submit such difference of opinion to arbitration, was in no manner the fault or result of any action suffered or taken by defendant, but, that, on the contrary, defendant had always been willing to submit such difference, etc."

The finding passed upon the issue. The complaint does not allege that plaintiff offered to submit, etc., and that defendant refused, but on the contrary, that the parties did select arbitrators. If, however, the averments could be construed as averments that plaintiff had sought to have the matter, as to amount of loss, submitted, the court found that plaintiff at no time offered to submit it, or took any steps to procure such submission, etc.

The evidence justified the findings of the court.

The appellant contends :—

First—The agreement to submit the difference of opinion as to the amount of loss or damage to the judgment of two disinterested men, etc., whose award should be conclusive and binding (in the absence of an agreement that the arbitrators shall be the exclusive and only tribunal to which the parties will appeal) does not debar the aggrieved party from appealing to the courts.

Second—The promise of defendant being to pay damages incurred by fire—not an award—its contract is broken by its failure to pay such damages.

It is well settled that a general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators, will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they think fit to liquidate damages, in their own nature unliquidated, and, in such case, no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it. In the case now here if the parties made the submission to arbitration a condition precedent to the right to bring an action on the policy, the judgment should be affirmed.

In *Elliott vs. Royal Exchange Insurance Company*, 2 Excheq. L. R., 241, the form of the policy was a covenant by the defendants that their capital stock, etc., should be subject to make good the plaintiff's loss, not exceeding two thousand two hundred pounds sterling, "according to the exact tenor of the articles hereunto subjoined." One of the articles subjoined was: "All persons assured by this corporation are upon any loss or damage by fire, forthwith to give notice thereof to the office in London, or to the known agents of the said corporation, and within fifteen days after such fire, deliver as particular an account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath or affirmation, and that of their domestics or servants, and by their books of accounts, or such other proper vouchers as may be required; which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the said corporation without any deduction; or they shall at their option forthwith provide or supply the assured with the like quantity and quality of goods with those burnt or damaged by fire; or at the expiration of sixty days after notice of the said fire, they shall expend in rebuilding or repairing any building damaged or destroyed by fire the sum assured thereon, under the direction of able and

experienced workmen, if the loss and damage shall, in their opinion, amount thereto. In case any difference shall arise touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim."

In that case it was urged by counsel, as is contended here, that the provision as to arbitration was no bar to the action, but at most a collateral covenant, on which, if broken, suit could be brought. It was admitted that that question in such cases—as held in *Scott vs. Avery*, 5 H. L. C., 811, and *Horton vs. Sayer*, 4 H. & N., 643—is whether the provision is a condition precedent to the right of payment, or is only a collateral covenant. The court held that resort must be had to the mode of adjustment by arbitration before suit could be brought. Kelly, C. B., said: "It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words, which state emphatically that before the loss is paid its amount shall be adjusted." And the same learned judge thus deduces, from the cases called to his attention, a general rule: "The fair result of the authorities is, that if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay the loss, with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts."

Martin B. and Pigott B. agreed with the chief baron, Bramwell B. differed as to the application of the rules to the case before the court.

In *Scott vs. Avery* (where Mr. Bramwell, as counsel, argued in favor of the conclusion reached by the House of Lords), the words in the contract were "the sum to be paid by this association to any suffering member shall in the first instance be ascertained by the committee." In *Elliott vs. R. E. Ins. Co.* they were that the loss "after the same shall be adjusted, shall immediately be paid." In the former case the House of Lords held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action. In the latter case the court could not see any dis-



inction which would justify them in holding that the adjustment of the loss, as provided in the articles, was not a condition precedent.

In the case at bar, by express provision of the policy, the defendant's stock and funds are made liable, "subject always to the conditions and stipulations indorsed hereon," etc. Referring to the conditions and stipulations, which qualify the general promise to pay in case of loss, we find : The defendant was not bound to pay until the declaration or affirmation, account and evidence therein provided for should be produced. That on proof of loss and adjustment of accounts, the company was bound to pay immediately, or, at its option, to rebuild ; and that in case of difference of opinion as to the amount of loss or damage, such difference should be submitted to the judgment of two disinterested and competent men, mutually chosen, etc.

We think the language of the stipulations brings this case within the principle laid down in the English case above referred to ; that it is the clear meaning of the contract, that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the insured to obtain it, no cause of action arose.

The rule as to the interpretation of contracts involving the question above considered, is clearly laid down in *Holmes vs. Richet*, 56 Cal., 307.

Judgment and order affirmed.

Ross, J., and McKee, J., concurred.

## UNITED STATES CIRCUIT COURT OF COLORADO.

EDWARD A. SPERRY ET AL.,  
vs.  
INS. CO. OF N. A.

The policy was on goods on "grade floor of the two-story, frame, shingle-roof building, situate, &c. On a lot adjoining, and distant a few feet, was a one-story building used as a storehouse, and connected with the first by a covered passageway in the rear.

*Held*, That the keeping of prohibited articles in the storeroom was not a violation of the policy provision against their storage in any building in which was the insured stock.

*Held*, That the storage was not a change increasing the hazard within the same premises.

HALLETT, J.

Action on a policy of insurance for \$1,000 issued by defendant to plaintiffs, of date Oct. 24, 1883, covering a stock of goods "on the grade floor of the two-story, frame, shingle-roof building, situate on the north side of Main Street, east of Custer Avenue, in Garfield, Chaffee County, Colorado." The goods were destroyed by fire Oct. 30, 1883. Several defenses are set up in the answer.

1. That the loss was caused not by fire but by an explosion of some kind, for which the defendant is not liable by the terms of the policy. This defense is not supported by the evidence.

2. That a clause of the policy prohibited the keeping of gunpowder, giant powder or nitro-glycerine in the premises where the goods were kept; "and defendant alleges that the plaintiffs at the time of the alleged damage, and for a long time prior, had deposited and stored on said premises and in said building where the stock of goods insured was, large quantities of gunpowder, giant

powder and nitro-glycerine—that is to say, one thousand pounds of each, without any consent of the defendant so to do expressed in the body of the policy, and without the knowledge and against the consent of the defendant.”

On this point the evidence shows that a one-story building on an adjoining lot, and some three or four feet from that mentioned in the policy, was used by plaintiffs as a storehouse.

A covered way connected the two buildings at some point towards the rear ; goods were taken into the storehouse and put out at times through front doors which opened on the street, but in general the storehouse was used only in connection with the building mentioned in the policy through the passageway at the rear.

Of the existence and use by plaintiffs of the building as a storehouse, its situation and connection with the main building in which plaintiffs' business was carried on, defendant's agent had notice at and before the time of issuing the policy—but whether the agent also had notice that giant powder or dynamite was kept in the storehouse is not clear. That substance was kept in the building open to view and defendant's agent was in the room ; nothing was said about it, and it may be going too far to assume that he saw it and knew what it was. However that may be, it is clear that the storehouse was not any part of the premises covered by the policy or within the prohibition of the policy as to keeping explosive substances. The prohibitory clause reads as follows : “Gunpowder, Fireworks, Nitro-glycerine, Phosphorus, Naphtha, Benzole, Benzine, Benzine Varnish, Camphene, Spirit gas, Gasoline, Phosgene or Burning-fluid, or any similar inflammable fluid are positively prohibited from being deposited, stored, kept or used in any building on which, or on the contents of which, there is any insurance under this policy unless by special consent expressed in the body of the policy, naming each article specifically—otherwise the insurance by this policy shall be void.” It refers only to the building in which the goods were stored on which insurance was given, and does not in any way refer to the storehouse or anything in it. In this clause plaintiffs were not limited in the use of the storehouse or any other building excepting that in which the goods covered by the policy were kept. Therefore the defense that such articles were kept in the premises mentioned in the policy is not made out.

3. Another clause of the policy on which defendant relies is as follows : “And if the assured shall in such application, survey or plan, or in any statement or description, written or oral, make any

misrepresentation as to the character, condition, situation, value or ownership of said property, or as to the occupancy of the premises or the exposures thereto, or any other misrepresentation whatever, or fail to make known every fact material to the risk, including the amount of incumbrance on said property, if any, this policy shall be void. The procuring of insurance on said property for more than its cash value, or the having of other insurance thereon, or any part thereof, valid or invalid, prior or subsequent, not made known to this company and consented to hereon; or any change increasing the hazard, either within the premises or adjacent thereto, within the control of, or known to the assured, and not reported to this company and agreed to by entry in due form in the body hereof, will render this policy null and void."

It is alleged that plaintiffs kept and stored "in the same building and on the same premises with the stock of goods insured," gunpowder, giant powder and nitro-glycerine in violation of this clause.

As has been stated already, the giant powder was in the storehouse and not as alleged "in the same building and on the same premises with the stock of goods insured." Therefore that defense is not made out.

4. Referring to that part of the clause last mentioned which forbids any change increasing the hazard, it is averred that plaintiffs "did make a change increasing the hazard within the premises and building in which was the stock of goods insured in said policy by depositing and storing large quantities of giant powder and nitro-glycerine on said premises and in said building after the issuance of said policy." This is answered by the statement already made that the giant powder was not kept "on said premises or in said building" as averred.

These matters are repeated in an amendment, which adds nothing to what has been stated. In all the defenses it is alleged that the giant powder was kept in or on the premises described in the policy, which if true would bar the action. But the fact is not as alleged; as fully explained, the prohibited article was kept not in or upon, but very near to the premises described in the policy.

The real question suggested by the evidence is whether the fact that giant powder was kept in the storehouse adjacent to the building mentioned in the policy was material to the risk and therefore a matter of which plaintiffs were bound to notify defendant at the time of application for the policy.

That is a question which can be raised by answer only, and when

thus presented is to be decided by the jury—*Capacia vs. Phoenix Ins. Co.*, 28 California, 628.

If it appeared to be wholly decisive of the case, perhaps the defendant would be allowed error at this late day to amend its pleadings in a way to avail of the defense. But the circumstances disclosed by the evidence, although suggestive of doubt, are by no means conclusive as to the fact. The warehouse was in use at the time application was made for the policy, and defendant had knowledge of it; giant powder is an article usually kept in stores in mining towns, and it was a fair inference that plaintiffs were dealing in it. To store or keep it with the goods insured was forbidden, but nothing was said as to keeping it in the warehouse or elsewhere without the main building.

As the dangerous compound was excluded from the building mentioned in the policy, it is not quite reasonable to go beyond the language of the contract and say that plaintiffs were also forbidden to keep it in another place.

If more was intended than is stated in the policy, why was it omitted from that instrument? To have prohibited the storage in the warehouse of any of the articles referred to as hazardous would have been easy enough, and the failure to do so gives support to the argument that it was not intended. But the question is not presented in the record and therefore not open to consideration except upon the matter of amendment. I am of the opinion that the defense to the action is not sustained, and judgment will be for plaintiffs.

SUPREME COURT OF WISCONSIN.

*Appealed from Walworth C. C.*

MORRISON

vs.

WISCONSIN ODD FELLOWS MUT. LIFE INS. CO.\*

A provision in the charter that the loss should be payable sixty days after notice cannot be set aside by a regulation made by the company subsequent to the issue of the policy.

In determining whether a court properly directed a verdict to be found, every evidence tending to prove facts adverse to the direction must be taken as established.

Where the secretary had in his hands evidence of a misstatement as to age which it was his duty to examine, the company cannot get up such misstatement to defeat a claim.

A provision in the by-laws requiring the certificate to be canceled and the money returned in case of fraud in the application must be complied with in order to avail of the fraud, and a continuation to receive assessments is a waiver of such alleged fraud.

The company may waive a restriction in the by laws as to age where there is nothing against it in the charter.

A representation of "sound health" in the application does not require absolute freedom from all bodily infirmities or tendencies to disease.

A party with consent of court may read only part of a deposition.

Where the condition of health was satisfactorily established at the time of insuring, its subsequent condition was immaterial.

MERTON and FISH for Respondent Morrison.

BIRD and BIRD for Appellant Company.

LYON, J.

1. The answer in abatement of the action which was overruled by the circuit court, will first be considered.

\*Decision rendered January 8, 1884.

In the charter of the company (Pr. L. Laws of 1869, Ch. 43, Sec. 7) it is provided that the insurance shall be payable within sixty days after notice of the death of a member shall be communicated to the secretary of the company by the proper officer of the lodge of which the deceased was a member. At the time the certificate of insurance in suit was issued in 1875, a by-law of the defendant company was attached thereto to the effect as provided in the charter that a loss should be payable sixty days after due notice to the secretary of the company of the death of the insured member.

In 1880, a new regulation was adopted by the company which provides that a loss shall be payable ninety days after the date of the notice of an assessment to pay such loss. The answer in abatement is based upon this regulation. The company utterly refuses to give notice of an assessment to pay the loss, and then pleads that the loss is not due until such notice is given. We need not determine whether this regulation is reasonable and therefore valid, because we are of the opinion that it does not effect a contract of insurance made before it was adopted. We think it indisputable that the above provisions of the charter and original by-law is a part of the contract of insurance and cannot be changed at the will of the company without the consent of the insured.

Due notice of the death of Mr. Morrison having been given to the secretary of the defendant more than sixty days before this action was commenced, if the company is not released on other grounds the loss was due and payable when the suit was brought, hence the court below properly overruled the answer in abatement.

The defenses to this action, on the merits, are that Morrison fraudulently misrepresented both his age and condition of health in his application for membership in class "E" of the defendant company. There was sufficient testimony to support a finding by a jury that he did misrepresent his age—stating it to be 46 years, when in fact he was ten years older, and was then ineligible to class "E." In determining whether the court properly directed a verdict for the plaintiff, every fact adverse to the plaintiff's right to recover, which the testimony tends to prove, must be taken as proved. Hence it must be assumed that Mr. Morrison misrepresented his age in such application. Assuming this, any rulings of the court on objections to testimony offered on the subject cease to be of any importance, and will not be further noticed.

The learned counsel for the defendant maintains that the effect of such fraudulent misrepresentations of age is to forfeit the contract

of insurance and relieve the defendant from liability upon it. Whether or not this is a correct proposition, is a vital question in the case.

It is understood that the circuit court held the negative of the proposition on the ground that the undisputed evidence showed conduct on the part of defendant in respect to the insurance which was a waiver of any forfeiture.

The facts established by the evidence are briefly these : Mr. Morrison became a member of class A in 1872. In his application for such membership he dated his age at 53 years. He paid an admission fee of \$5.00. In 1880 he became a member of class D, and in his application for such membership he gave his age at 62 years.

In his application for such membership in class E, Mr. Morrison states that he was a member of class A, and in his last application he stated his membership in class A and E. On becoming a member of class E and D, he paid an admission fee of but \$1.00 in each class. The amount required to be paid on his first admission is fixed by Sec. 2 of the charter at five dollars. The admission fee to any additional class is fixed by the company at one dollar. It is understood that a member of one class cannot be admitted to another unless he paid all assessments against him in that class. After Mr. Morrison became a member of class E, he paid forty assessments made against him in that class by the proper officer of the company. Ten of these were so made and were paid by him after his certificate of membership in class D was issued. The secretary who makes the assessments for the company is the custodian of the books of the company, and in these books are entered the names, ages, residences, etc., of all the members of each class.

When the secretary received the application of Mr. Morrison for membership in class E, accompanied by an admission fee of one dollar only, it was manifestly his duty to examine the books to ascertain whether there was any discrepancy in his statements in the two applications. In like manner he should have scrutinized Mr. Morrison's record in class A and E when the application for membership in class D was received. The secretary represents the company in respect to those matters, and his acts and omissions in the premises are the acts and omissions of the company. With abundant evidence in its hands to detect the misstatement of age in the application for admission to class E, and its duty being to examine that evidence, the company cannot now be heard to say that it was ignorant of the misstatement or is prejudiced by it. At the very least, the



company must be charged with notice, when it issued to Mr. Morrison a certificate of membership in class D, that his age was misstated in his application for membership in class E.

Knowing that fact it could avoid payment on the latter certificate in but one way, and that is pointed out on its own by-laws. One of these provides that "in case a certificate of membership has been issued upon an application fraudulent or false in any settlement therein, the secretary shall cancel the certificate and return the money."

Instead of doing so, the secretary, representing the company, did not cancel the certificate, or return the money, but continued to make assessments upon Mr. Morrison as a member of class E, all of which assessments Mr. Morrison paid. Had the policy been canceled, Mr. Morrison would have been relieved of the obligation to pay these assessments. Within the rule of many cases decided by this court, the course pursued was an effectual waiver of any right of the company to cancel the policy. *Webster vs. Ins. Co.*, 36 Wis., 67; *Gans vs. Ins. Co.*, 43 Wis., 108; *Joliffe vs. Ins. Co.*, 39 Wis., 111; *Ergman vs. Ins. Co.*, 44 Wis., 376. The whole subject of waiver is so fully discussed in the above cases that it is quite unnecessary to discuss it here.

There is nothing in the charter of the company which restricts membership therein or in any of its classes to persons of any particular age. It was competent for the company to admit persons as old as Mr. Morrison in class E. Having that power it could waive in his favor the restriction of the by-law in that behalf. In this respect the case differs from that of *Luther vs. Ins. Co.*, 55 Wis., 543, wherein it was sought to apply the doctrine of consent and waiver to an act which was prohibited by the charter of the company, and which the company had no power to authorize. It was held that there could be no waiver of a forfeiture in such a case. Had the charter of the present defendant restricted membership therein to persons under fifty years of age, we should have a case like *Luther vs. Ins. Co.* Were such the case the company could not waive the forfeiture. But we are dealing with no such case.

It seems clear that there was an effectual waiver by the company of the right to cancel the certificate of Mr. Morrison's membership in class "E," because of the misstatements of his age, and hence that such misrepresentation does not defeat the action.

We will now consider the defense that Mr. Morrison misrepresented the condition of his health in his application for membership

in class "E." The representation was, "I am, so far as I know, in sound health."

Dr. Blanchard was the only witness examined on this defense. He testified that Mr. Morrison consulted him professionally in 1873, and about four or five times afterwards before 1881. He says Mr. Morrison complains of indigestion, flatulence, pain in the stomach after meals. The doctor told him he thought he had a touch of dyspepsia coming on." The difficulty occurred at intervals—the only one specified being from four to six months—and seemed to yield readily to treatment. This is the only testimony that Mr. Morrison was suffering from disease, or was not in sound health when he made the representation in question.

We think the testimony fails entirely to show that there was any misrepresentation by Mr. Morrison in that behalf. It would be most unreasonable to interpret the term "in sound health" as used in contracts for life insurance to mean that the insured is absolutely free from all bodily infirmities or from all tendencies to disease. If that were the meaning, we apprehend but few persons of middle age could truthfully say they were in sound health. Yet to obtain a life insurance a person must say that or its equivalent. It is absurd to suppose that Mr. Morrison intended to say in his application that he had no bodily infirmity and was aware of no tendency to disease, or that the company so understood him. Many cases have been adjudicated which give construction to the term "good health" or "sound health" (which means the same thing) as those terms are used in contracts for life insurance. Some of these cases are referred to in *May on Insurance*, Sec. 295. They all seem to sustain the conclusion we have reached that "a touch of dyspepsia coming on," which manifests itself only after long intervals, which yields readily to medical treatment, and which is not shown to have been (as some of these cases put it) organic and excessive, is not inconsistent with a representation that the person so affected is in sound health as that term is employed in contracts for life insurance.

The result of the foregoing views is that the defendant failed entirely to sustain either defense interposed by it, and the evidence established conclusively the plaintiff's right to the verdict which the jury returned under the direction of the court.

Two exceptions to the rulings of the court on objections to testimony remain to be considered.

1. On the trial counsel for plaintiff introduced her deposition, theretofore taken, but read only a portion of it. Counsel for de-

fendant insisted that he should read the whole deposition, but the court did not require him to do so. The answer to this objection is that if counsel for defendant desired to have the remainder of the deposition read to the jury, he was quite at liberty to read it. He did not do so, probably because the deposition contains nothing of any great value to either party. Counsel claimed the court ruled erroneously, on the authority of *Juneau Bank vs. McSpeeden*, 15 Wis., 629. The case does not support the position. A party offered to read a deposition taken at the instance of the opposite party, but was allowed to read only his own cross-examination of the deponent. It was held that he had a right to read the whole deposition, and the judgment for the opposite party was reversed because he was denied that right. The case is of no value on the point here under consideration.

2. The defendant was allowed to give all the testimony offered by it in respect to the condition of Mr. Morrison's health previous to, and down to the time he made his application in class E. It then attempted to prove the condition of his health after that time until he died, and also the disease of which he died, but the testimony was rejected.

It has already been determined that the undisputed testimony establishes conclusively that Mr. Morrison did not misrepresent the condition of his health in his application for admission to class E. Hence the condition of his health later, and the disease of which he died are immaterial. The testimony was properly rejected.

Some other exceptions are discussed, but they do not affect the conclusions above stated, and will not be further noticed.

Judgment affirmed.

## SUPREME COURT OF INDIANA

MAY TERM, 1882.

*Appeal from the Posey Circuit Court.*

ÆTNA INS. CO.

vs.

GODFREY WEISINGER, ADM'R.\*

The right of cancellation reserved by the company can only be exercised in strict compliance with the conditions. In the absence of any agreement to the contrary the whole ratable proportion of the premium must be refunded.

An agreement of the insurer to accept less than the ratable proportion of unearned premium is binding upon him, and where the evidence showed that such an agreement was made and there was no evidence of a mistake, its allegation and proof in connection with the cancellation of the policy is sufficient defense to an action for recovery on a subsequent loss.

BICKNELL, J.

This was an action on a policy of insurance, No. 339, by the administrator of the assured. The complaint was in the common form, alleging a loss by fire on May 29, 1879.

One of the conditions of the policy was that "if the company shall so elect, it shall be optional with the company to cancel the policy, which shall cease on notice being given to the assured, his or their representatives of its decision to do so, and on tendering a ratable proportion of the premium for the unexpired term." The defendants answered in three paragraphs.

1st. The general denial.

2d. Admitting the execution of the policy and the loss, and aver-

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\* Decision rendered November 7, 1883.

ring that before such loss the company availed itself of said condition, and on February 18, 1879, by its agent paid the assured \$13 which he received and accepted in full payment as the ratable proportion of the premium for the unexpired term of the policy and said policy was then canceled, and the assured agreed to return said policy to the company.

3d. This paragraph differed from the second paragraph by answering that the assured owed Frank Smith \$50; that he, defendant, notified the assured of its election to determine the policy, and that the defendant and the assured agreed that the premium for the unexpired term of the policy was \$13, and that said sum should be paid by the defendant to said Smith, to be credited on his account against the assured; that said sum was so paid and credited, and the assured gave defendant the following receipt signed by him:—

“MOUNT VERNON, IND., February 18, 1879.

“\$13. Received of W. L. Sullivan, agent of the Aetna Ins. Co., of Hartford, Conn., the sum of thirteen dollars, being for returned premium on No. 339, canceled.”

The plaintiff replied in denial of these special defenses. The issues were tried by the court who found for the plaintiff \$1,200.

The defendant's motion for a new trial was overruled, judgment was rendered on the finding, and the defendant appealed.

The only error assigned is the overruling the motion for a new trial. There were several reasons for a new trial, but the only question discussed in the appellant's brief is the sufficiency of the evidence.

The conditions heretofore set forth was valid, but the right thereby secured to the company could be exercised only by a strict compliance with the conditions. In the absence of any further agreement, the whole ratable proportion of the premium was required to be refunded, the payment of a less sum would not alone put an end to the insurance. *Van Valkenburg vs. Lenox Ins. Co.*, 51 N. Y., 465; *Hathorn vs. Germania Ins. Co.*, 55 Barb., 26; *May on Ins.*, sec. 574; *Wood on Ins.*, sec. 106.

It is not alleged in the second paragraph of the answer that the whole amount of the ratable proportion of the premium was actually paid, the allegation is that thirteen dollars was paid which was accepted as a full payment of such ratable proportion, and thereupon the policy was canceled and the assured agreed to return it to the defendants. And the third paragraph of the answer does not allege

that the amount paid was the whole amount of such ratable proportion ; its allegation is that it was agreed between the assured and the defendant that the amount of such ratable proportion was \$13, which was paid and accepted in full thereof, the assured giving defendant a receipt therefor, " being for return premium on No. 339, canceled."

These defenses being met only by the general denial, if either of them was sustained by the evidence, the findings should have been for the defendant.

The evidence was substantially as follows: The plaintiff proved the policy and the loss as stated in the complaint, and that the defendant had refused to pay the policy, alleging that it had been canceled.

Here the plaintiff rested, and the defendant proved and read in evidence the receipt as set forth in its third defense, and also proved a conversation between the assured and the defendant's agent, in which the assured directed the agent to give him credit on his account in the books. They were talking about insurance and policies, but the witness could not say what policy they were speaking of.

The defendant then rested, and the plaintiff in rebuttal proved that the unearned premium on the policy was \$13, and that on cancellation by mutual agreement, the amount to be paid would be agreed upon, and that when a policy is canceled there are two rates known to insurance companies, the long and the short rate ; that on a cancellation by request of the assured the short rate is charged, if canceled by the company the long rate is charged. This closed the proof.

Upon this evidence it clearly appears that the unearned premium was not refunded. Eighty-three cents of it were left unpaid. But as already stated, there was no issue joined as to that. The defendant in its defenses had not averred that the whole amount of the unearned premiums was paid, their averment was substantially that the defendant and the assured had agreed that the amount of the unearned premiums was \$13, which the company had paid and the assured had received as a full payment of the ratable proportion of the premiums and that the assured had given the defendant a writing stating that he had received \$13 for return premiums on the policy and that the same was canceled.

The assured had a right to take or refuse the \$13. He had a right to agree with the defendant that the unearned premium was \$13 ; he had a right to take that sum in cancellation of the policy.

The receipt shows that he did this. There was no evidence tending to show any mistake in the writing, it was given for the amount actually paid and received, and shows upon its face that that amount was taken for the cancellation of the insurance. Even where a mistake in such a writing can be corrected, it can be done only upon proper averments and evidence. Not only was the answer substantially sustained by the evidence, but upon the issues joined by the reply, the evidence was all in support of the answer; it was not a case of conflicting evidence, nor of immaterial issues. The special defenses allege an agreement as to the amount to be paid upon cancellation, the payment of the amount and thereupon a cancellation of the policy. These defenses were proved in substance, and they constitute a sufficient defense to the action. The court, therefore, erred in overruling the motion for a new trial.

Judgment reversed and a new trial ordered.

SUPREME COURT OF PENNSYLVANIA.

*Error to the Court of Common Pleas of Mercer County.*

SUSQUEHANNA MUT. FIRE INS. CO. }

vs. }

BROWN & SON.\*

Where the secretary of an insurance company "was instructed to go around and examine the risks and cancel the policies or reduce the amounts where they were considered too large," the execution of such a power as this includes the power to make a contract with a person holding a policy, for the reduction of the policy.

The power to make such contract necessarily includes, in the absence of evidence to the contrary, the power to agree upon the terms including release, etc.

J. R. Brown & Son, defendants in error and below, were members of the Susquehanna Mutual Fire Insurance Company. At the time of becoming members they took out a policy for \$2,000 and gave a premium note for \$990, payable as the company might make assessments thereon.

Assessments known as 4, 5 and 6 were made, amounting to \$184. These assessments were for losses occurring prior to March, 6, 1878.

Defendants refused payment on the ground that on the 6th of March, 1878, they had agreed with B. K. Huntzinger, secretary of the insurance company, to surrender the policy for \$2,000, and take a new one for \$1,000. That at that time they had paid \$93.10; that all claims prior to that date had been settled and defendants were therefore relieved from further liability.

There was no dispute as to the surrender and cancellation of the old policy, nor as to the issuing of the new, but it was denied by the

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\* Opinion filed Nov. 13, 1884. From *Pittsburgh Legal Journal*.



company that the \$93.10 was in full settlement of prior losses, or was paid in consideration of release, etc., from liability.

There was some dispute as to the authority of the secretary to make the contract for release as claimed.

The court refused to charge as matter of law that the assessments were in conformity with the charter and by-laws of the company—the charter and by-laws not having been put in evidence.

The court further ruled as matter of law that the secretary of the company would have no right as such to make a contract such as claimed by the defendants, and whether he had authority in fact, or the board of directors ratified his acts, was a question of fact for the jury under all the evidence.

Verdict for defendant.

EDWIN W. JACKSON, Esq., *for Plaintiff in Error.*

MESSRS. S. GRIFFITH & SONS AND L. KUDER, *Contra.*

GREEN, J.

The questions at issue in this case were questions of fact and were decided by the jury in favor of the defendants, after what seems to us to have been a very fair and impartial charge. It must be conceded that there was ample evidence given by the defendants in support of their theory that the plaintiff's agent contracted with them, that upon the surrender of the old policy and issuing the new one, and the payment of \$93.10, and the premium on the new policy, there was to be no liability on the part of the defendants to any further assessments under the old policy. Homer, who was the local agent of the plaintiffs, testified to this positively. C. R. Brown testified substantially to the same effect, and also that the premium note given with the old policy was to be canceled or given up. The contradictory testimony of Huntzinger simply carried the question as to what the contract was to the jury, who of course were the sole judges as to what were the terms of the contract and the credibility of the witnesses.

On the question whether the agent, Huntzinger, had authority to make the contract in question there was but little direct evidence, but such as it was, it tended in support of the defendants' theory. He said that he told the defendants that he "was instructed to go around and examine the risks, and cancel the policies, or reduce the amounts where they were considered too large." He did not state whether there were any limits to this general authority, or that he

had no authority to make the contract in question, though he was examined at considerable length. Nor was any other officer of the company examined to prove that he did not have authority to make the contract claimed by the defendants. It does not appear that the authority he did have was in writing, and the inference from Huntzinger's testimony is that it was by verbal instruction. According to his own statement he was instructed to examine the risks and cancel the policies or reduce the amounts where they were considered too large. The execution of such a power as this includes the power to make a contract with a person holding a policy, for the reduction of the policy, and that was precisely what was done in this case. Certain terms were agreed upon. The defendants agreed to surrender their old policy for \$2,000, and take a new one for only half that amount, \$1,000. They also agreed to pay and did pay a new premium in cash of \$40 on the new policy. In addition to this they agreed to pay and did pay \$93.10, which they and their witness Homer alleged was to be in full of all assessments past and future upon the old policy. This is denied, that is, so far as it relates to future assessments, but that denial only carries the question to the jury and in no wise impairs its effect upon the question of authority. The old policy in point of fact was given up and marked canceled, and returned to the plaintiff company. We do not see how it can be said, absolutely and as matter of law, that upon such a state of testimony there was no authority in the agent to agree with the defendants that they should not be subject to any further assessments under the old and canceled policy. He declared to them that he was instructed to cancel policies or reduce the amounts where they were considered too large, and he thought their policy was too large, and proposed to agree with them for its reduction. Could he not do this if he was so instructed? There is no dispute about his instruction. How else could he carry it out than by an agreement upon terms, in a case in which he proposed to, and did effect a reduction by an agreement. He did not propose to make an arbitrary reduction, but a reduction by contract. But if he was authorized to do this by contract the power to make the contract necessarily includes the power to agree upon the terms, unless he was restricted upon this subject, and of this there was no evidence. It seems to us this is all there is in the case, and that the learned court below properly committed the case to the jury on all the questions involved.

In this view the third and sixth assignments become immaterial.

We do not think the remarks of the court covered by the seventh assignment are obnoxious to the criticism made upon them, as the court especially said that contracts made with mutual insurance companies must be lived up to the same as other contracts.

Judgment affirmed.

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UNITED STATES CIRCUIT COURT OF MINNESOTA.

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GROSS

vs.

ST. PAUL F. & M. INS. CO.\* )

A stipulation in a policy of insurance that "the assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto, when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claim under the policy," is valid.

A defense that the fire by which the insured property was destroyed was of an incendiary character and plaintiff implicated therein, may be joined in the answer with a defense that the policy contained a condition that plaintiff should submit to an examination under oath, and that such examination had been demanded and refused; and where the jury, in answer to special questions, find that plaintiff has refused to submit to such examination when demanded, and plaintiff has not moved to compel defendant to elect as to which defense it will rely upon, judgment may be entered in favor of the defendant notwithstanding a general verdict against it.

On Motion for Judgment.

BREWER, J.

This was an action on a policy of insurance. The answer alleged, as a separate defense, that the policy contained the following stipulation:—

"The assured shall, if required, submit to an examination or examinations under oath by any person appointed by the company, and subscribe thereto,

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\* Decision rendered Oct. 24, 1884. From *Federal Reporter*.

when reduced to writing, and a refusal to answer any such questions or sign such examination shall cause a forfeiture of all claim under this policy."

And also that the company demanded and the plaintiff refused to submit to such an examination. The policy, when produced on the trial, contained a stipulation, and the jury, in answer to special questions submitted, found that there was a demand and refusal as alleged. Upon this the company moved for judgment, notwithstanding the general verdict against it. Plaintiff insists that this defense must be disregarded because inconsistent with another specially pleaded, to the effect that the fire was of an incendiary character and the plaintiff implicated therein. That defense, counsel argues, was that no liability ever existed; this admits that one existed, but claims that it has become discharged by subsequent action of the plaintiff. Both cannot be true. But, if inconsistent, no motion was made to compel defendant to elect. *Conway vs. Wharton*, 13 Minn., 160. (Gil. 145). And why should defendant be now compelled to stand upon that defense which the jury have found against it? But they were not inconsistent. The facts alleged in each may have been true. The plaintiff may have burned the property, and he may also have refused to submit to an examination. The defendant may set up all the defenses it claims, and if it fails to prove one, may rely on another. In an action to charge an indorser on a note, the defendant may plead no notice and the statute of limitations. Both, as facts, may be true, and yet the former proves that there never was any established liability; while the latter, that all liability has been discharged by the act of the plaintiff in neglecting to sue. *Conway vs. Wharton*, *supra*; *Shed vs. Augustine*, 14 Kan., 282.

Again, it is insisted by counsel that defendant has waived the right to insist upon this defense. But how? Surely not by its conduct prior to the suit, for it demanded the examination; not by its pleading, for it specifically set up this defense; nor by its course on the trial, for it proved the demand and refusal. A party waives only when he fails to act when he ought to act. But defendant has at all times insisted on this defense. It has never misled the plaintiff, or acted in such manner as to induce him to believe that it had been waived. An insurer, it is true, by accepting preliminary proofs without objection, or alleging defects therein in its answer, waives all such defects and admits the proofs sufficient. That principle was recognized on this trial in respect to the magistrate's certificate; and that is the rule enunciated in the authorities cited by counsel. But that rule does not control in this respect. The right was insisted on

in time. The answer pleaded the defense, and the proof on the trial sustained it. Finally, it is a defense. The stipulation is a valid one. It is one for the protection of the insurer, and not onerous to the insurer. It is akin to the stipulation requiring the insured to exhibit his books of account, invoices, etc.; one in the interests of justice and fair dealing. The insurer may insist on compliance, and the insured must comply or give a valid excuse therefor. *Mueller vs. Insurance Co.*, 45 Mo., 84; *Deweese vs. Insurance Co.*, 34 N. J. Law, 244.

Judgment will be entered in favor of the defendant for costs.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

ACCORD AND SATISFACTION.

§ 40. FIRE.—*What is.*—The plaintiff and defendant, having had a controversy as to what was due the former, he wrote to the latter to send him “such an amount as you feel inclined, which shall be accepted in full satisfaction of my claims.” The defendant sent in response \$268.31, which was retained by the plaintiff. *Held*, That it was an accord and satisfaction.

*Childs vs. Milville Mut. M. & F. Ins. Co.*

*Rep'c Jour'l*, p. 231.

Vt. S. C.

## ADJUSTMENT.

§ 41. FIRE.—*By Unauthorized Agent, Effect of Acceptance.*—The plaintiff was an insurance agent for the defendant company. A fire loss having occurred on one of the policies which he had issued, he adjusted and paid it, without any obligation to do so, and without any knowledge or authority or ratification of the defendant. Afterwards, on receipt of what he had paid, the plaintiff surrendered the policy duly receipted to the company, claiming no interest. *Held*, A full discharge of interest.

*Childs vs. Millville Mut. M. & F. Ins. Co.*

—\$40.

§ 42. FIRE.—*Effect of Compromise and Surrender of Policy on Subsequent Liability.*—The charter of a mutual company, which was incorporated in the policy, provided that "Every member of said company shall be bound to pay for all losses or damages, and all necessary expenses accruing in said company, in proportion to the amount he or she may have insured in the different classes, annually or as often as the directors may make assessments;" also that "any member can withdraw from this company at any time by paying his or her proportion of the losses up to date of withdrawal, and surrendering his or her policy." The by-laws provided that the president "shall have full power to examine, adjust, and settle in all cases of loss, not exceeding \$100," and in "all cases exceeding this amount, he may call to his assistance one or more directors, as he may think necessary, and shall call special meetings of the board of directors when necessary, and shall have general supervision over the affairs of the company." *Held*, That the president might adjust the loss by a compromise of a certain sum, surrender of the policy, and release from future assessments. The charter provided that any member might withdraw by payment of his proportion of losses to date and surrender of policy. *Held*, That, if such a surrender and settlement were made, the insured was released from all further liability.

*Mercer County Mut. F. Ins. Co. vs. Stranahan.*

Rep'd Jour'l, p. 353.

PA. S. C.

## ALIENATION.

§ 43. FIRE.—*Without transfer of Policy.*—A policy of fire insurance provided that if the building was sold or transferred, the policy would be rendered void, unless ratified to the assignee thereof by the written consent thereon, signed by the president and secretary, or any two directors of the company. *Held*, That a sale of the buildings without a transfer of the policy, rendered the policy void.

*Gould vs. Androscoggin Mutual Fire Ins. Co.*

Decision rendered June 10, 1884.

MR. S. J. C.

## BENEVOLENT SOCIETY.

§ 44. LIFE.—*Title to Funds in Case of Surrender and Change of Beneficiary.*—*Insurable Interest.*—The certificate of a benevolent society provided for the payment to the wife of insured, or his legal representatives. After the death of the wife, with consent of the society, the certificate was canceled, and another issued, payable to a party in no way related to him. *Held*, That the intention of the insured was that the payment should be made to his wife, or in case of her prior death, to his legal representatives, who are ordinarily the executors or administrators, and his rights were the same as if made payable to himself in the absence of children. *Held*, That he had a right to surrender, and take out a new policy payable to another. *Held*, That the taking out of a policy and making it payable to one having no insurable interest is not illegal or void on grounds of public policy.

Citing and discussing Bliss on Insurance, sec. 317; May on Insurance, secs. 390, 391; Continental Life Ins. Co. vs. Palmer, 42 Conn., 60; Chapin vs. Fellows, 36 id., 132; Gould vs. Emerson, 99 Mass., 154; Glanz vs. Gloeckler, 104 Ill., 513; Clark vs. Durand, 12 Wis., 248; Kerman vs. Howard, 23 id., 108; Foster vs. Gill, 50 id., 603; and Gambs vs. Mutual Life Ins. Co., 50 Mo., 44; Loose vs. John Hancock Life Ins. Co., 41 Mo., 538; 2 Jarman on Wills, sec. 649; Swift vs. Mutual Aid Society, 96



Ill., 309. *Cole vs. Marple*, 98 Ill., 58; *Mutual Benefit Life Ins. Co. vs. Atwood*, 24 Gratt., 497; *Mutual Life Ins. Co. vs. Coghill*, 30 id., 72; *Doll vs. Lincoln*, 31 Maine, 428.

*Johnson vs. Van Epps.*

Rep'd Jour'l, p. 194.

ILL. S. C.

§ 45. *LIFE.—Construction of Certificate as to Beneficiary.—Questions of Fraud.—Proofs of Death as Evidence.*—A benefit certificate was payable to wife and children, or in the event of their death, to his legal heirs. Suit was instituted in behalf of wife and five children; while pending one child died. *Held*, That judgment for the whole amount was properly rendered in favor of the wife and four surviving children. Questions of fraud in procuring the certificate or as to the amount of recovery dependent upon conflicting testimony cannot be reviewed by any appellate court. Proofs of death are proper to show that the cause of death was not among those excluded by the policy, and it was no error to refuse to instruct that they are not evidence of what disease the insured died, and cannot be considered for that purpose. But it would not have been improper to instruct that the proofs were no evidence as to the special cause of death therein alleged if so requested.

*Covenant Mut. Ben. Association vs. Hoffman.*

Rep'd Jour'l, p. 220.

ILL. S. C.

## DIVIDENDS.

§ 46. *LIFE.—Declaration of by Officers Construed.—Effect on Renewal.*—Where annual dividends are declared by a life insurance company, in accordance with an established rule, and the acts of the officers show that they are payable on certain classes of policies, a subsequent attempt on its part to limit the meaning of the vote, and make it at variance with the contemporaneous written rules and the acts of the company, is vain, the attempt being evidenced by the erasure of the dividend indorsement from the premium notes, and the company will be liable.

for the amount of the dividends so erased. The office of a renewal of a life insurance is to prevent discontinuance or forfeiture; and the word "renewed," in the vote of the directors of an insurance company granting dividends upon certain policies answering this description, includes participating, limited-payment policies, which have been prevented from forfeiture prior to the passage of the dividend.

*Heusser vs. Continental Life Ins. Co.*

Rep'd Jour'l, p. 202.

CONN. U. S. C. C.

### EVIDENCE.

§ 47. FIRE.—*Oral to Vary written Agreement as to Keeping Premises Insured.—Opinion of Agent.*—Evidence of an oral agreement as to keeping premises insured is not admissible to vary terms of a mortgage. Nature of evidence as to amount involved, motives, proof of inducement. Relevancy of instructions. A loan agent's opinion expressed as to his duty in keeping mortgaged property insured, will not render him liable.

*Brant vs. Gallup.*

Rep'd Jour'l, p. 224.

ILL. S. C.

### MEASURE OF DAMAGES.

§ 48. FIRE.—*For Failure to Insure.*—A party is not entitled to damages for breach of contract in failing to insure where he had notice and might have insured himself. The assumption of such duty by the owner releases the party agreeing to insure. Only nominal damages are recoverable for failure to insure where no harm resulted, and no recovery can be had after five years.

—§ 47.

*Brant vs. Gallup.*

§ 49. FIRE.—*What is not an Over-valuation Under the Three-Fourths Rule.—Recovery for Loss Omitted from Proofs.*—The

building was estimated in the application, which was a warranty, to be worth \$550. The charter, which was part of the contract, allowed only three fourths of the value to be paid. The insurance was for \$400. The actual value, as found by the jury, was \$336.66. *Held*, That there was not an over-valuation which would work a forfeiture. The insured may recover for personal property not included in proofs, if he has done nothing prejudicial to such recovery in connection with the proofs.

*Schmidt vs. Mut. City & Village F. Ins. Co.*

*Rep'd Jour'l*, p. 207.

MICH. S. C.

#### MUTUAL COMPANY.

§ 50. FIRE.—*Construction of Ohio Statute as to Assessments and Profits.*—Revised statutes of Ohio, sections 3,686, 3,687, 3,688, 3,689, 3,690, authorize the formation of corporations to insure its members against loss by fire or other casualties, and empower them to make and enforce among their members contracts of indemnity, by which those entering therein shall agree to be assessed specifically from time to time, as may be necessary to pay losses which occur to its members, and, also, to pay incidental expenses in the management of the business.

Such members are liable to be specifically assessed, from time to time, to pay losses which occur while they are such, but no member is liable to such assessment to pay losses occurring before he became a member, or which may occur after he ceases to be a member.

These sections do not authorize a contract with members, by which they, upon advance payment of an agreed annual deposit during the life of their policy, shall be exempted from liability to assessment to pay losses occurring during the year for which such prepayment was made; or by which a member's liability to assessment is limited, without regard to the amount that may be necessary to pay losses to fellow members that may occur during such year.

These sections do not authorize the organization of corpora-

tions with a view to profit by its officers or members ; therefore any plan or scheme by which profits are made or divided is unauthorized.

Section 3,680 authorizes the adoption by the corporation of a constitution and by-laws regulating the assessment and collection of such sums of money as may be necessary to pay losses as they occur, and for incidental purposes ; but it does not authorize a regulation by which a policy may be declared forfeited for the non-payment in advance of an annual deposit or premium, whether an assessment during such year to pay losses may be necessary or not.

Such an annual deposit paid in advance, based upon the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year, is in fact a premium paid for carrying the risk, and not a specific assessment authorized by the statute.

The funds derived from assessments upon members to pay losses to fellow members are in their nature trust funds to be applied to the payment of such losses ; hence the application of such funds, or of the annual deposits received in lieu of assessments, to the purchaser of the assets of another like corporation, including real estate not necessary to its business, or to the payment of losses to the members of such other corporation whose risks it has assumed, is a misapplication of such funds.

Judgment of ouster.

*State of Ohio, ex rel. Attorney-General, vs. Monitor Fire Association.*

Decision filed Jan. 12, 1885.

OHIO S. C.

## PARTNERSHIP.

§ 51. FIRE.—*Incompleted Agreement for is not a Change of Title.*—A fire policy, covering merchandise belonging to a firm, provided that it should be void if the property “be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured),

whether by legal process or judicial decree, or voluntary transfer or conveyance." Subsequently, and before loss, the firm, owning this property in certain proportions, made an agreement in writing with A., by which they agreed to receive him into their business upon the following terms and conditions: Said company is to become incorporated. A. is to pay into the firm for its use \$5,000 forthwith, and \$5,000 in two years, with interest semi-annually until paid. The name of the new company shall be determined hereafter. The property of the existing firm shall be put into the corporation to be formed as aforesaid, adding to it the \$10,000 to be paid by A. The interest and shares of the several parties in the new company shall be in proportion to the amount so contributed by each to the capital stock. When a charter shall be procured as aforesaid, half of A.'s stock shall be held by said company till said second sum of \$5,000, with interest, shall be paid. No change in the name or character of the existing firm shall be made until said corporation shall be formed. *Held*, That A. did not become a partner, or acquire any interest in the property of the partnership, before it was made a corporation.

*Drennen, Starr & Everett vs. London Ass'n Corporation.*

Rep'd Jour'l, p. 187.

N. Y. U. S. S. C.

#### PREMIUM.

§ 52. *LIFE*.—*Effect of Payment by a Dishonored Bill of Exchange*.—Policy of life insurance being conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity; and the annual premium being paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity, the policy should be void; *Held*, That the forfeiture was incurred by non-payment of the bill, on presentment at maturity, without protest for non-payment, although protest might be necessary to fix the liability of the drawer. *Semble*, if it had been the bill of a stranger, protest would have been necessary for the forfeiture also. Presentment and non-acceptance of the bill before maturity, without protest, did not dispense with

presentment for payment, in order to produce the forfeiture. Want of funds in the hands of the drawer was no excuse for not presenting the bill, if the drawer had reasonable expectation to believe that it would be accepted and paid.

Dickins vs. Beal, 10 Peters, 557 (and see Daniel Neg. Instr. § 1074).

*Knickerbocker Life Ins. Co. vs. Pendleton.*

Rep'd Jour'l p. 177.

TENN. U. S. S. C.

### PROOFS OF DEATH.

§ 53. *LIFE.—Denial of Liability a Waiver of.*—Preliminary proof of death not required, if the insurer, on being notified thereof, denies his liability altogether, and declares that the insurance will not be paid.

Taylor vs. Merchants' Fire Ins. Co., 9 How., 390, 403; Allegre vs. Maryland Ins. Co., 6 H. & J., 408; Norwich Co. vs. Western Mass. Ins. Co., 34 Conn., 561; Thwing vs. Great Western Ins. Co., 111 Mass., 93, 110; Brink vs. Hanover Fire Ins. Co., 80 N. Y., 108; May on Insurance, §§ 468, 469.

*Knickerbocker Life Ins. Co. vs. Pendleton.*

- § 52

§ 54. *LIFE.—Waiver of Objections to.*—Where the plaintiff is misled by the defendant in regard to furnishing of proofs, and no objections were made to their tardiness when received, the company cannot set up that they were too late at the trial.

*Edwards vs. Travelers Life Ins. Co.*

Rep'd Jour'l, p. 212.

N. Y. U. S. C. C.

### REINSURANCE.

§ 55. *MARINE.—Construction of Policy as to Re-shipment.—Measure of Damages under Excess Policies.*—The plaintiff insured

cotton on the steamer *C.*, with privilege of re-shipping from places on the Yazoo River, to tributary of the Mississippi to New Orleans, to the amount of \$3,950; also on the steamer *P.*, to the amount of \$1,100. The cotton on the *C.* was all transshipped to the *P.* at Vicksburg, and afterwards the latter took on additional cotton at another point, further insured in plaintiff for \$1,225. Plaintiff had a reinsurance contract with defendant on the excess on its policies on cotton, sugar, molasses and cotton seed, "on the excess of \$10,000 on boats from places on the Mississippi River, but said excess not to exceed \$5,000 by any one boat. On their excess of \$5,000 on boats from places on the tributaries of the Mississippi River, but said excess not to exceed \$15,000 by any one boat." *Held*, That the terms of the reinsurance contract were descriptive of the boats rather than the freight. Ambiguous language must be construed most strongly against the insurer. *Held*, That the reinsurer was liable for the excess of \$1,275.

*Phoenix Ins. Co. vs. Cochran.*

LA. U. S. C. C.

#### SUICIDE.

§ 56. *LIFE.—Accidental Death from Poison.*—Death resulting from poison taken by mistake is not within the provision of a policy, that it should be void in case of death "by suicide whether the act be voluntary or involuntary."

*Penfold vs. Universal Life Ins. Co.*, 85 N. Y., 317.

*Edwards vs. Travelers Life Ins. Co.*

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#### UNAUTHORIZED INSURANCE.

§ 57. *FIRE.—What Constitutes Insurance in Case of Assessment Corporation.—Action in Quo Warranto.*—A contract by which one party promises to make a certain payment upon the loss or destruction of something which the other party owns or

has an interest in, is a contract of insurance. That the promisor is a corporation; that its promise is only to those who become members of the corporation, and that it has no accumulated funds out of which to make good its promise, but relies therefor exclusively upon assessments made upon its members, do not change the character of the contract. The State has the right to say who may engage in the business of insurance, and upon what terms, and may proceed by civil action in quo warranto against any corporation created under the laws of the State, which, without authority, assumes to carry on the business of insurance.

*State vs. Bankers' Association*, 23 Kas., 499; *Bolton vs. Bolton*, 73 Me., 299.

*State of Kansas vs. Vigilant Ins. Co.*

Rep'd Jour'l, p. 234.

KAN. S. C.

#### VACANT.

§ 58. FIRE.—*Removal of Tenant without Knowledge of Owner.*—An absolute condition in a fire insurance policy, on a dwelling-house, that the policy shall be void "if the building insured be vacated or left unoccupied" avoids the policy, although the vacation of the house results from the permanent removal of the tenant of the insured during the running of his lease, without the knowledge or consent of the landlord.

*Farmers' Insurance Co. vs. George W. Wells.*

Decision rendered January 20, 1885.

OHIO S. C.

§ 59. FIRE.—*Temporary Absence is n t.*—After the premises had been vacated by the tenant, the owner desiring to occupy them, moved in her furniture, and proceeded to clean them while stopping near by, but being called away temporarily on business, she placed them in charge of one who had an interest in them,



and they were burned during her absence. *Held*, That the house was not vacant within the meaning of the policy.

*Stupetski vs. Transatlantic Fire Ins. Co.*, 43 Mich., 378 ; s. c., 5 N. W. Rep., 401 ; *Cummins vs. Agricultural Ins. Co.*, 67 N. Y., 260 ; *Herrman vs. Merchants' Ins. Co.*, 81 N. Y., 184 ; *Phoenix Ins. Co. vs. Tucker*, 92 Ill., 64 ; *Dennison vs. Phoenix Ins. Co.*, 52 Iowa, 457 ; s. c., 3 N. W. Rep., 500. *Distinguishing Wustum vs. Ins. Co.*, 15 Wis., 138 ; *Ashworth vs. Ins. Co.*, 112 Mass., 422 ; *Corrigan vs. Ins. Co.* 122 Mass., 298 ; *Herrman vs. Ins. Co.* 85 N. Y., 162.

*Shackelton vs. Sun Fire Office.*

Rep'd Jour'l, p. 216. .

MICH. S. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME COURT OF PENNSYLVANIA.

*Error to the Court of Common Pleas of Mercer County.*

MERCER COUNTY MUT. FIRE INS. CO.\*

vs.

STRANAHAN.

The charter of a mutual company, which was incorporated in the policy, provided that every member should be bound to pay for all losses and damages, in proportion to the amount insured, annually or when assessments were made. The by-laws provided that losses might be adjusted by the president, with the assistance of one or more directors, if necessary.

*Held*, That the president might adjust the loss by a compromise of a certain sum, surrender of the policy, and release from future assessments.

The charter provided that any member might withdraw by payment of his proportion of losses to date and surrender of policy.

*Held*, That, if such a surrender and settlement were made, the insured was released from all further liability.

EDWIN W. JACKSON, Esq., *for Plaintiff in Error.*

MESSRS. STRANAHAN & MEHARD, *for Defendant in Error.*

CLARK, J.

This action is brought to recover assessments upon two policies of insurance of the Mercer County Mutual Fire Insurance Company. One of the said policies, No. 86, issued January 13th, 1873, covered an insurance to James A. Stranahan upon certain property therein described, for one year from that date, to the amount of \$3,086; the other, No. 290, issued January 16th, 1874, after the expiration of No. 86, covered an insurance to Stranahan & Hoagland, upon a por-

\* Decision rendered January 7, 1884.

tion of the property, for one year from the latter date, to the amount of \$1,280.

The company operated under a charter of incorporation, the ninth section of which provides as follows : "Every member of said company shall be bound to pay for all losses or damages, and all necessary expenses accruing in said company, in proportion to the amount he or she may have insured in the different classes, annually or as often as the directors may make assessments." No premium notes were taken, the assessments being made directly against the policy-holders under this clause of the charter, which was incorporated into each policy, and formed part of the contract.

The affairs of the company were conducted by a board of twelve directors. No assessments were at any time made until the 13th April, 1880, when, in obedience to a writ of mandamus awarded by the Court of Common Pleas of Mercer County, the board assessed the policy-holders for a sum sufficient to pay the indebtedness of the company. In this general assessment policies Nos. 86 and 290 were embraced, the former to the amount of \$246.88, and the latter of \$42.

On or about the 17th of March, 1874, after policy No. 86 had expired, and while No. 290 was in force, the property insured was wholly or partially destroyed by fire. The company was duly notified of the loss, and on the 13th July, 1874, Seth Hoagland, president of the company, J. P. Kerr, and another, composed a committee on behalf of the company to adjust the same.

The third section of the first article of the by-laws of the company provides, that the president "shall have full power to examine, adjust, and settle in all cases of loss, not exceeding \$100," and in "all cases exceeding this amount, he may call to his assistance one or more directors, as he may think necessary, and shall call special meetings of the board of directors, when necessary, and shall have general supervision over the affairs of the company." Mr. Stranahan's loss was adjusted, under the provision of the by-laws, by Mr. Seth Hoagland, president, and Mr. J. P. Kerr, directors of the company, at \$800, an abatement of \$480 having been agreed upon. The defendant alleges that, in this adjustment, and by the agreement upon which it was effected, he was released from all future assessments which might otherwise have been made on his policies Nos. 86 and 290, to cover losses incurred during the period of their continuance, and that the policies were canceled and surrendered to the company, the release being embodied in a writing thereon indorsed.

We have no doubt whatever that an adjustment upon such terms was within the power of the company, and, if so, that authority, under the fourth section of the charter, might be delegated, as it was in this case, to an adjusting committee of the board. The president had "general supervision over the affairs of the company," and alone, or with the concurrence of any member of the board, had full power to examine, adjust, and settle in all cases of loss. This adjusting committee had as much power to effect settlement of losses incurred as the board, and that power was derived from the same source. The action of the committee was not subject to the approval of the board of directors; the committee had "full power."

By the ninth section of the company's charter, it is provided, that "any member can withdraw from this company at any time by paying his or her proportion of the losses up to date of withdrawal, and surrendering his or her policy." This surrender and settlement, it is alleged, was made, and the policies properly canceled and delivered to the president of the company. If this be true, and the jury have so found, the insurance relation was thereby broken, and no further liability remained as against either of the contracting parties. The proportion which the losses incurred bore to the whole amount insured, at the time of the loss, gave the ratio of the defendant's liability to the loss, and thus a reasonably approximate estimate could at any time be made.

Whether or not there was in fact an agreement to release the defendant's policies from future assessments, was the specific question for the jury. The release, if given at all, covered both policies, and this defense was to the whole of the plaintiff's claim. Mr. Stranahan's testimony upon this question was positive; he testified as to an existing fact, of which he claimed to have actual knowledge. Mr. Hoagland, in rebuttal, testified as positively that no such fact existed, and, although he testified in negative form, his assertion is positive in effect; that is to say, he testifies positively that no such transaction occurred with him.

There is, however, a difference between the character of the testimony delivered by Hoagland and that of J. P. Kerr, on the precise question before the jury. The court used language a little strong, perhaps, in saying that the testimony of Mr. Kerr "amounted to nothing in the shape of contradicting Mr. Stranahan," if this was spoken of the entire testimony of both of these witnesses; we think, however, this language is subject to a qualification, which

is contained in the charge as a whole. The vital question for the jury, as has been stated, was whether or not there was an agreement to release the policies from future assessments. Even if there was, in fact, a difficulty in the adjustment, such as Mr. Kerr referred to, arising out of Clingan's alleged purchase, that was not at all inconsistent with the agreement; for the adjustment and abatement made might have been in consideration of either or both of these together.

The distinction between positive and negative testimony was carefully stated, and the jury was fully instructed as to the nature and effect of each. It was certainly manifest to the jury that the reference of the court in the expression quoted was alone to the negative portion of Kerr's testimony, and to this only was it applied.

We are not inclined, therefore, to reverse the judgment upon this ground, as we are clearly of opinion there is no room for the assertion that the charge as a whole was misleading.

As the defense embraced in this submission to the jury was the whole of the plaintiff's claim, the finding of the jury being for the defendant, it is unnecessary for us to consider the question arising under the statute of limitations.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

*In Error to the Circuit Court of the United States for the Western  
District of Tennessee.*

KNICKERBOCKER LIFE INS. CO.,

*Plaintiff in Error,*

vs.

P. H. PENDLETON AND OTHERS.\*

Policy of life insurance being conditioned to be void if the annual premium, or any obligation given in payment thereof, should not be paid at maturity; and the annual premium being paid by a foreign bill drawn by the party insured, with a condition that if not paid at maturity the policy should be void; *Held*, That the forfeiture was incurred by non-payment of the bill, on presentment at maturity, without protest for non-payment, although protest might be necessary to fix the liability of the drawer. *Semble*, if it had been the bill of a stranger, protest would have been necessary for the forfeiture also.

Presentment and non-acceptance of the bill before maturity, without protest, did not dispense with presentment for payment, in order to produce the forfeiture.

Want of funds in the hands of the drawer was no excuse for not presenting the bill, if the drawer had reasonable expectation to believe that it would be accepted and paid.

Preliminary proof of death not required, if the insurer, on being notified thereof, denies his liability altogether, and declares that the insurance will not be paid.

BRADLEY, J.

This action was brought in the first Circuit Court of Shelby County, Tennessee, by the defendants in error, Pleasant H. Pendleton and others, against the plaintiff in error, the Knickerbocker

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\* Decision rendered January 5, 1885.

Life Insurance Company, to recover the amount of a policy of life insurance on the life of Samuel H. Pendleton. After declaration filed, the case was removed into the Circuit Court of the United States, and the defendant then pleaded no indebtedness, failure to pay the stipulated annual premium, failure to pay a draft given for premium, and failure to give notice and proof of death. A replication put the cause at issue, and it was tried at Memphis, in November term, 1880, and a verdict rendered for the plaintiff. Judgment being entered upon this verdict, the case is brought here by writ of error. The matters for our consideration are exhibited in a bill of exceptions taken at the trial, from which it appears that the plaintiff introduced in evidence the policy sued on, dated July 14th, 1870, issued for the benefit of the plaintiffs, as the children of Samuel H. Pendleton, for the sum of \$10,000 on his life, in consideration of \$364.60 then paid, and of the annual premium of a like sum to be paid on or before the 14th day of July in every year during the continuance of the policy. The company agreed to pay the sum insured within three months after due notice and satisfactory proof of the death of the person whose life was insured; but the policy contained the following condition, to wit: "the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein."

The plaintiffs next introduced in evidence the renewal receipt in the words and figures following, viz.:-

*Renewal Receipt.*

"Mississippi Valley Branch Office of the Knickerbocker Life Insurance Company at Memphis, Tenn., principal office 161 Broadway, N. Y., renewal No. 94,597.

NEW YORK, July 14, 1871.

Received of Pleasant H. Pendleton, &c., three hundred & sixty-four 65-100 dollars, being the premium on policy No. 2346, which is hereby continued in force until the fourteenth day of July 1872. at noon.

Not valid until countersigned by the managers of the Mississippi Valley Branch office at Memphis, Tenn.

ERASTUS LYMAN, *President.*

GEO. F. GRIFFIN, *Secretary.*

Countersigned at Memphis this  
45,432.]

day of 18  
GREENE & LUCAS, *Managers."*

The plaintiffs then introduced evidence tending to show that Samuel H. Pendleton died at his home, near Auburn, Arkansas, on the 26th day of March, 1872; that his children, the plaintiffs, were then under age; and that their uncles, A. O. Douglass and W. F. Douglass, on their behalf, wrote from Auburn to Greene & Lucas, the agents of the defendants at Memphis, the former on the 29th of March, and the latter on the 2d of April, 1872, giving them notice of Pendleton's death. A. O. Douglass, in his letter, requested Greene & Lucas to advise him what steps were necessary to be taken in the matter of the policy, and Greene & Lucas at once answered, by letter dated April 2d, that the policy became forfeited on the 14th of October, 1871, by failure to pay the premium, explaining that when the premium became due, they took the draft of Doctor S. H. Pendleton on Moses Greenwood & Son, of New Orleans, at three months, in lieu of the cash, conditioned that failure to pay the draft would forfeit the policy; and that Greenwood & Son refused to accept the draft and refused to pay it at maturity. The correspondence was continued by an additional letter from W. F. Douglass to the agents, dated April 9th, and a reply to the same by the latter, dated April 15th, 1872, repeating their position that the policy was forfeited and void, and that there was no legal claim to the insurance.

The defendants below, after an unsuccessful motion for a nonsuit, put in evidence the following draft, given by Samuel H. Pendleton in part payment of the premium which became due July 14th, 1871:

"\$325.00.

AUBURN, ARK., *July 14th, 1871.*

Three months after date, without grace, pay to the order of the Knickerbocker Life Insurance Co., three hundred and twenty-five dollars, value received, for premium on policy No. 2346, which policy shall become void if this draft is not paid at maturity.

[Signed]

S. H. PENDLETON.

To Moses Greenwood & Son, New Orleans, La."

Evidence was then introduced by the defendants tending to show that the draft was transmitted by the agents of the company through the Union and Planters' Bank, of Memphis, to the Louisiana National Bank, of New Orleans, to be presented for acceptance, and was received by the latter bank, and presented on the 29th of September, 1871; that acceptance was refused by Moses Greenwood & Son, the drawees, assigning as the reason of their refusal that they had no advice; that no protest of the draft for non-acceptance was



made, because it was marked "no protest;" but that it was returned, on the 30th of September, to the Union and Planters' Bank of Memphis; that it was again transmitted to the Louisiana National Bank, on the 5th of October, 1871, for collection, but was not paid when it became due, and, for the same reason as before, no protest for non-payment was made, and it was returned to the Union and Planters' Bank, on the 17th of November, 1871. No direct evidence of presentment to the drawees for payment was given; but the cashier of the Louisiana National Bank testified that, according to their rules and custom of doing business, it must have been presented for payment when due. Evidence was further introduced tending to show that, on or about the 3d of October, 1871, when the draft was first returned from New Orleans, the agents, Greene & Lucas, informed S. H. Pendleton, by letter, of its non-acceptance; and again, on or about the 20th of November, 1871, they informed him in the same way of its non-payment; that in the latter part of November, or early in December, 1871, he (Pendleton) called on said agents, and expressed surprise that Greenwood & Co. did not pay his draft, but said that they were then prepared to pay it; that the said agents informed him that, as the policy was lapsed by reason of the non-payment of the draft, it would be necessary, in order to re-open the same, that he should be re-examined; and that he promised to call again, but never did; also, that the dealings of the insurance company in reference to the issue of the policy and the payments of premiums thereon, were solely with the said S. H. Pendleton.

Moses Greenwood, of the firm of Moses Greenwood & Son, a witness on the part of the plaintiffs, testified to the effect that his firm were cotton factors and commission merchants, and acted as such for S. H. Pendleton, in 1869, 1870, and 1871, furnishing him supplies for his plantation and selling his cotton crops; and kept a running account with him; and were accustomed to accept and pay his drafts even when he had no money or property in their hands, so that he had good reason to believe that the draft in question would be honored. The witness presented a copy of the account of his firm with S. H. Pendleton, which showed a balance in his favor on the 14th of July, 1871, of about \$200, but a balance against him on the 14th of October, 1871, of \$502.52. The witness stated that he found no entry of the acceptance or payment of the draft in question, and had no recollection of it other than what was shown by the books and by certain letters from the firm to Pendle-

ton. One of these letters, dated September 29, 1871, informed him (Pendleton) that his draft for life policy (some \$330) was presented that day for acceptance; that, having no advice of it, they had requested that it be held till they got an answer from him, and asked him to write at once if he wanted it paid. The other letter, dated November 4, 1871, acknowledged one from him (Pendleton) of the 27th October, and added, "Will pay that insurance note when presented, as you request. This is the first advice we have had about it."

After the evidence was closed, the defendant below (the insurance company), through its counsel, requested the court to direct the jury to find a verdict in favor of the defendant on the ground that the policy sued on was not in force at the time of the death of the person whose life was insured thereby. The court refused to give such direction, and the defendant excepted.

The defendant then requested the court to give the following several instructions to the jury:—

1. That upon the undisputed facts appearing from the evidence the defendant is entitled to a verdict.

2. That the reception of this draft for \$325 by the defendant on account of premium, imposed upon the drawer or the plaintiffs the duty of making absolute provision for its payment at maturity at the place of payment, and if he or they failed to do so the defendant was under no obligation to present the same for payment.

3. That the refusal of the drawees to accept the draft when presented for acceptance relieved the defendant from its obligation, if any existed, to present the same for payment in the absence of further notice that the same would be paid when due.

4. That if they believe from the evidence either that the drawer had not placed any funds in the hands of the drawees to meet the draft at its maturity, or that it was in fact presented for payment at or after its maturity, the policy became void and of no effect upon the death of the party whose life was insured thereby, and the plaintiffs are not entitled to recover.

The court refused so to charge, and the defendants excepted.

Thereupon the court proceeded to charge the jury upon the whole case; but it will only be necessary to examine a single point, in which, as we think, the charge was erroneous, and upon which the whole case depends. The point is this: The court instructed the jury, in substance and effect, that the insurance company, having accepted the draft or bill of Dr. Pendleton on his factors for the premium due

on the policy, was in duty bound to pursue all the steps necessary to enable it to recover against him as drawer of said draft or bill, regarded as a bill of exchange under the law merchant,—amongst which steps, one was that of protesting the bill for non-acceptance, and another, that of protesting it for non-payment. The court held that, whilst it was not necessary that the draft should have been presented for acceptance before maturity, yet that, having been so presented, and acceptance refused, the defendants ought to have had it regularly protested, and notice of dishonor given to the drawer. The court further held, that if the draft was presented for payment, and not paid, the defendants were bound to have had it regularly protested for non-payment. True, it was conceded that the defendants might be excused from the performance of these duties if it were shown that the drawer had no funds in the hands of his factors, and had no reasonable expectation that his draft could be accepted. But, unless this excuse could be established, the doctrine of the charge was that the defendants must have complied with all the before-mentioned formalities, incident to commercial paper, in order to entitle them to the benefit of the condition for avoiding the policy. The following language was used on this subject. The court said:—

“The defense of the company is that the condition for payment has been violated and the policy ceased before the death of Pendleton. This is undoubtedly a good defense, unless the law imposed some obligation on the company to perform some duty in respect to the draft which it has not performed, and the neglect of which precludes it from invoking the breach of the condition for payment as a defense. In other words, if by its own laches, and neglect of the duty assumed by its holder of the draft, the failure to pay has occurred, or the parties have been injured, the company cannot rely on the breach of this condition as a defense. What, then, were the duties imposed on the company as a holder of this draft by the contract of the parties? \* \* I have concluded that the true measure of the duty of the company is to be found in the rules of law governing a holder of commercial paper, and that by the very fact of taking a draft like this they assumed, in reference to this paper, all the duties devolving on a holder of it taken for any other consideration, and were obliged to proceed with it as any holder would be under the commercial law. On the other hand, any neglect to proceed properly in the discharge of that duty would be excused under the same circumstances as such neglect would be excused with any other holder, and not otherwise. The condition in the policy was a security to the

company, of which it can avail itself only by showing a strict compliance with that duty, or some lawful excuse for non-compliance. \* \* \*

"There is no doubt the draft was sent forward for acceptance, presentment, and acceptance refused. \* \* It was not protested for non-acceptance, the agents of the company having directed that no protest should be made, and no legal or proper notice of non-acceptance was given to the drawer. This was a clear breach of duty on the part of the company, and precludes it from claiming a forfeiture of the policy unless excused, as to which I shall instruct you further on. If protest and legal notice had been given for non-acceptance, the company need not have presented for non-payment; but, not having protested the note for non-acceptance, it was its duty to present at maturity and demand payment. There is some dispute as to whether the note was presented for payment on the day of its maturity, namely, October 14th, 1871, or later, but there is no claim that it was protested for non-payment and legal notice given. The only notice was a letter from the agents, dated November 20, 1871. This was not legal notice, and the drawer was clearly discharged unless the neglect was excused. By this neglect, as well as the neglect to protest and give legal notice for non-acceptance, the company precluded itself from relying on a breach of the condition in the policy."

As the drawer of the bill in this case was really interested in the policy on behalf of his children, we do not concur in the view taken by the court below, that a forfeiture of the policy required, on the part of the insurance company, as holders of the bill, the same diligence and performance of the same acts, as were required of them to make the drawer liable upon it. For the latter purpose a regular protest for non-acceptance, or non-payment, or a proper excuse for omitting them, such as want of funds in the hands of the drawees, was undoubtedly necessary; for, according to the general law prevailing in this country, the draft was a foreign bill of exchange, being drawn by a person resident in one State upon persons resident in another. *Buckner vs. Findley*, 2 Pet., 589; *Dickins vs. Beal*, 10 Pet., 572, 579; *Story on Bills*, §§ 23, 465; 1 *Daniel's Nego. Inst.*, pp. 7, 8, sect. 7. But, whether the policy would not be forfeited without any such protest, or excuse for non-protest, is a different question, depending upon the contract of the parties. This contract was expressed on the face of the draft itself, which contained a statement that it was given for premium on policy No. 2,346, followed by this condition: "which policy shall become void if this draft is not paid at maturity." This was the condition and the only condition on

which the policy was to become void. The primary condition expressed in the policy itself, of forfeiture for non-payment of the premium on the day it became due, was waived by the receipt of the draft, and the consequent extension of the time thereby. The renewal receipt given when the draft was received was absolute, it is true, acknowledging the receipt of the premium, and declaring the policy continued in force for another year. But this receipt is explained by the actual transaction, the mode of payment being shown to be the making and delivery of the draft in question, having in it the condition above expressed, which condition was in exact accordance with the secondary condition contained in the policy, namely, "failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest hereon, shall then and thereafter cause this policy to be void, without notice to any party or parties interested herein." We think it clear, therefore, that, notwithstanding the renewal receipt, the condition expressed in the draft was binding on the insured. As we have shown, that condition was that the policy should become void if the draft was not paid at maturity. The draft, being without grace, matured on the 14th of October, 1871. If not paid on that day the policy was forfeited, unless it was the usage of the New Orleans banks to grant days of grace even when they were waived, of which there was some evidence on the trial. In such case, the forfeiture would take place, if the draft were not paid on the 17th of October. Of course, it must be presented for payment on the one day or the other,—for the drawees could not pay it unless it was presented, for they would not know where to find it. But supposing it to have been presented for payment, and payment refused by the drawees, then the condition of forfeiture was complete. Protest and notice of non-payment might be further necessary to hold the drawer, if the insurance company desired to hold him; but they were not necessary to the forfeiture. That occurred when non-payment at maturity or presentation occurred. The drawer, Pendleton, who took entire charge of the policy for his children, put its existence on the condition of payment of the draft at maturity; and it was his business, as agent or guardian of his children, to see that the draft was thus paid; that the requisite funds were in the hands of the drawees, or that they would pay it whether in funds or not. Such, we think, was the clear purport of the condition, and as the court below took a different view, holding that the insurance company was bound not only to present the draft for payment, but to have it protested for non-payment, be-

fore a forfeiture of the policy would ensue, the judgment must be reversed.

What might have been the result had the bill of a stranger been taken in payment of the premium, is a different question, which we are not now called upon to decide. It may be that in such a case the company would have been required to take all the steps necessary to fix the liability of all the parties to the bill.

With regard to the other points raised by the plaintiffs in error, a few words will suffice.

1. They contended at the trial, and contend here, that no presentment of the draft was necessary, because Pendleton had no funds in the hands of the drawees. The substance and effect of the charge given by the court on this point was that, if Pendleton had a reasonable expectation that the draft would be accepted and paid; as if there was an agreement between him and the drawees, that they would accept his drafts, or a course of dealing between them in which the drawees were accustomed to accept his drafts without reference to the state of their mutual accounts, he was entitled to demand and notice; or, according to our view of the principal point in the case, the insurance company was bound to present the draft for payment at its maturity. In this we think there was no error. The law is laid down substantially to the same effect in *Dickins vs. Beal*, 10 Peters, 557 (and see *Daniel Neg. Instr.* §1074).

2. The plaintiffs in error contend that, as the draft was not accepted by the drawees when presented for acceptance, they were under no obligation to present it for payment at maturity. This would be so in an ordinary case of non-acceptance of a bill, provided it was followed up by protest and notice. But this particular draft, or bill, had a condition in it, that the policy should be void if it were not paid at maturity, and the plaintiffs in error claimed the benefit of this condition. As forfeitures upon condition broken are to be strictly construed, the condition in this case could not be regarded as broken by the non-acceptance of the bill before maturity; but could only be broken by non-payment at maturity. The drawees might not have felt authorized to accept the bill when it was presented; and yet, when it came to maturity, in consequence of further advice from the drawer, or other reasons, they might be ready and willing to pay it. The holders of the policy were entitled to this opportunity of obviating a forfeiture. We are of opinion, therefore, that the court below was right in holding that a presentment for payment was necessary, notwithstanding the non-acceptance.

3. The plaintiffs in error further contend that the charge was erroneous in holding that no formal proof of the death of S. H. Pendleton was necessary in this case. On this point the charge was as follows: "As to the proof of loss not being filed, it is conceded notice of the death was given. If, when that was done, the agents of the company repudiated all liability, and informed the parties that the policy had lapsed, then no proof of loss was required by them, and the failure to file it cannot alter the case." We think that there was no error in this instruction. The weight of authority is in favor of the rule, that a distinct denial of liability and refusal to pay, on the ground that there is no contract, or that there is no liability, is a waiver of the condition requiring proof of the loss or death. It is equivalent to a declaration that they will not pay, though the proof be furnished: *Tayloe vs. Merchants' Fire Ins. Co.*, 9 How., 390, 403; *Allegre vs. Maryland Ins. Co.*, 6 H. & J., 408; *Norwich Co. vs. Western Mass. Ins. Co.*, 34 Conn., 561; *Thwing vs. Great Western Ins. Co.*, 111 Mass., 93, 110; *Brink vs. Hanover Fire Ins. Co.*, 80 N. Y., 108; *May on Insurance*, §§ 468, 469.

The preliminary proof of loss or death required by a policy is intended for the security of the insurers in paying the amount insured. If they refuse to pay at all, and base their refusal upon some distinct ground without reference to the want or defect of the preliminary proof, the occasion for it ceases, and it will be deemed to be waived. And this can work no prejudice to the insurers, for in an action on the policy the plaintiff would be obliged to prove the death of the person whose life was insured; whether the preliminary proofs were exhibited or not.

The judgment of the circuit court is reversed, and the cause remanded, with directions to award a new trial.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1884.

*In Error to the Circuit Court of the United States for the District of  
Minnesota.*

EUGENE J. A. DRENNEN, FREDERICK W. STARR,  
and EDWARD D. EVERETT, PARTNERS as DREN-  
NEN, STARR & EVERETT, *Plaintiffs in Error.*

vs.

LONDON ASSURANCE CORPORATION.\*

A fire policy, covering merchandise belonging to a firm, provided that it should be void if the property "be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance." Subsequently, and before loss, the firm, owning this property in certain proportions,\* made an agreement in writing with A, by which they agreed to receive him into their business upon the following terms and conditions: Said company is to become incorporated. A is to pay into the firm for its use \$5,000 forthwith, and \$5,000 in two years, with interest semi-annually until paid. The name of the new company shall be determined hereafter. The property of the existing firm shall be put into the corporation to be formed as aforesaid, adding to it the \$10,000 to be paid by A. The interest and shares of the several parties in the new company shall be in proportion to the amount so contributed by each to the capital stock. When a charter shall be procured as aforesaid, half of A's stock shall be held by said company till said second sum of \$5,000, with interest, shall be paid. No change in the name or character of the existing firm shall be made until said corporation shall be formed.

*Held,* That A did not become a partner, or acquire any interest in the property of the partnership, before it was made a corporation.

HARLAN, J.

This action was brought on two policies of fire insurance, issued

\* Decision rendered January 6th, 1885.



March 10, 1883, by the London Assurance Corporation, of London, on certain goods, wares and merchandise, which, it is admitted, was, at the time of insurance, the property of the firm of Drennen, Starr & Everett, doing business in the city of Minneapolis, Minnesota. The loss occurred on the 29th of July, 1883, and there was no dispute at the trial as to its amount.

Each policy contained a provision that it should be void if the property insured "be sold or transferred, or any change takes place in title or possession (except by succession by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer or conveyance." Also, that "if the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, \* \* \* it must be so represented to the corporation, and so expressed in the written part of this policy, otherwise the policy shall be void. When property has been sold and delivered, or otherwise disposed of, so that all interest or liability on the part of the assured herein named has ceased, this insurance on said property shall immediately terminate."

The defendant disputed its liability on the ground that Drennen, Starr & Everett, on the 24th of May, 1883, before the loss, admitted one Arndt as a partner in their firm, and that thereby, without its knowledge or consent, and by the voluntary act of the plaintiffs, the title, interest and possession of the insured in the property was changed, and the policies became void. The plaintiffs denied that Arndt ever became a member of their firm or acquired any interest in the property insured. Upon this issue the proof was, substantially, as will be now stated.

Arndt resided in Sandusky, Ohio. He visited Minneapolis in May, 1883, and first became acquainted with plaintiffs, Drennen and Starr, on or about the 20th day of that month. Negotiations then commenced with Drennen and Starr, who acted for their firm, and resulted in the making of the following agreement:—

"This agreement, made and entered into this 24th day of May, A. D. 1883, by and between E. J. A. Drennen, F. W. Starr, and Edward D. Everett, who are now members of and constitute the firm of Drennen, Starr & Everett, all of the city of Minneapolis, Minnesota, parties of the first part, and D. M. Arndt, of the city of Sandusky, Ohio, party of the second part, witnesseth: Said parties of the

first part hereby agree to receive into their business said Arndt on the following terms and condition :—

“ 1st. Said company is to be incorporated.

“ 2d. Said Arndt is to pay into said firm for its use, on or before June 14th, 1883, five thousand dollars.

“ 3d. Said Arndt is to pay into said firm for its use, on or before January 1st, 1885, an additional sum of five thousand dollars.

“ 4th. Said Arndt is to pay said firm interest at the rate of 8 per cent per annum on each of said sums of five thousand dollars from January 1st, 1883, till each of said sums shall be paid as aforesaid, the interest on last-mentioned sum to be paid semi-annually.

“ 5th. If said Arndt shall be unable to pay said second \$5,000 by January 1st, 1885, his interest shall be decreased 50 per cent and until said last mentioned sum of \$5,000 shall be paid, or interest decreased as aforesaid, the liability of said Arndt therefor shall be evidenced by his promissory note executed to said firm bearing interest as aforesaid, and dated January 1st, 1883. The business to be carried on by the new company to be formed as aforesaid shall be of the same nature as that now conducted by Drennen, Starr & Everett; the name of the new company to be formed shall be determined hereafter.

“ It is understood and agreed that of the effects and rights of the firm of Drennen, Starr & Everett, Drennen owns one half, and said Starr and Everett each one fourth thereof. All said rights and effects shall be put into the corporation to be formed as aforesaid, at their value as shown by the inventory taken January 1st, 1883, less any loss by reason of non-payment of any claim for goods sold by them before that time, and that to the amount to be contributed as aforesaid shall be added said sum of ten thousand dollars to be paid by said Arndt as aforesaid.

“ The interest and shares of the several parties to this agreement in the new company shall be in proportion to the amount contributed by each to its capital stock according to the plan aforesaid.

“ When a charter shall be procured as aforesaid 50 per cent of the stock of said Arndt shall be held by said company, or some one in trust for it, till said second sum of \$5,000, with accruing interest thereon, shall be paid. It is understood said Arndt is to attend to the book-keeping and office work of said business, and that each remaining partner of the firm of Drennen, Starr & Everett shall actively engage in the business of the new company; that no change in

the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed.

"In testimony whereof, said parties hereto set their signatures, the day and year first herein written.

"E. J. A. DRENNEN.

"FRED. W. STARR.

"DAVID M. ARNDT."

"Everett, one of the plaintiffs, was then absent from Minneapolis, but, upon his return soon after, was informed by his partners of the contents of the written agreement with Arndt. The latter, immediately after the agreement was signed, went to Sandusky, but returned to Minneapolis about the 17th of June, 1883. This was after Everett learned from his partners what had occurred between them and Arndt. On the 18th of June, 1883, plaintiffs received from Arndt the sum of \$5,000, which was placed to his individual credit upon the account books of the firm, and was by plaintiffs deposited in their bank; and on July 3, 1883, he made and delivered to them his promissory note for \$5,000, which was also entered upon their account books to his individual credit. It was accepted by them as other bills receivable in their business.

This constituted the whole evidence upon which the case went to the jury. There was a verdict and judgment for the defendant.

At the trial below the plaintiffs asked the court to instruct the jury that the written agreement with Arndt, followed by his payment of \$5,000 in money, the delivery of his note for a like amount, and the entry of the money and notes to his individual credit upon the books of Drennen, Starr & Everett, did not constitute him a partner with plaintiffs, as between themselves, and did not have the effect to assign or transfer to him any title or interest in the property insured. The court refused to give that instruction, but charged the jury that "said agreement so signed, if assented to by Everett, and the receipt by plaintiffs of the money and note and the credit thereof on their books to Arndt, would and did constitute Arndt a partner with plaintiffs, as between themselves, from the time of the receipt by plaintiffs of said money, and had the effect to convey and transfer to and vest in Arndt a joint and undivided interest and title with plaintiffs in the insured property."

The instruction refused, as well as the one given by the court, assumes that the admission of Arndt at any time before the loss as a partner in the firm to which the policies were issued, would have

involved such a transfer of the property or such a change in its title or possession as would render the policies void. Without considering whether that assumption is justified by a proper interpretation of the policies, we have now only to determine whether there was error in holding that Arndt, by virtue of the agreement of May 24, 1883, and the facts recited in the charge to the jury, became a partner in the firm of Drennen, Starr & Everett. This question is within a very narrow compass; for our inquiry is restricted to the ascertainment of the real intention of the parties as disclosed by the written agreement, considered as a whole, and by their conduct in execution of its provisions.

It appears, in the forefront of the agreement, that Arndt did not acquire an interest in the firm property immediately upon its execution; for the plaintiffs only agreed to receive him into their business on certain terms and conditions thereafter to be performed. The first of those conditions was, that the company—the one to be formed by the proposed connection between the plaintiffs and Arndt—should become incorporated; then, he was to pay into the firm for its use, on or before June 14, 1883, the sum of \$5,000, and a like sum on the 1st of January, 1885, the latter to be evidenced by his note, each sum to bear interest from January 1, 1883, until paid; finally, his interest was to be decreased fifty per cent if he failed to pay the second \$5,000 by January 1, 1885; “the business”—that in which Arndt was to have an interest—“to be carried on by the new company, to be formed as aforesaid, shall be of the same nature as that now conducted by Drennen, Starr & Everett. Then follows a declaration as to the property upon the basis of which the new company was to be organized, viz.: all the rights and effects owned by Drennen, Starr & Everett, in the proportion of their respective interests, to be put into the corporation to be formed, according to their value as shown by the inventory of January 1, 1883, less any loss, by reason of non-payment for goods sold before that date, to which was to be added the ten thousand dollars which Arndt agreed to pay—the interest of the several parties in the new company to be according to the amounts contributed by them, respectively, to its capital stock.

These provisions all plainly point to an interest that Arndt was to acquire, not presently, nor immediately upon the agreement being signed, but at some future period, when the conditions distinctly set out in the agreement, not some but all of them, were performed. When those conditions were satisfied, and not before, he would

have been entitled to demand, as of right, the execution of the stipulation that he be received into the business then represented by Drennen, Starr & Everett, thereafter to be represented by the new or incorporated company. The parties appear, *ex industria*, to have excluded the possibility of his acquiring an interest in or control over the insured property in advance of the formation of an incorporated company. Upon no other ground can the clause, "that no change in the name or character of the firm of Drennen, Starr & Everett shall be made until said corporation shall be formed," be satisfactorily accounted for. It may be that Drennen, Starr & Everett, were unwilling to establish the confidential relations of partner with Arndt, but were willing to unite their property with his money, to be owned by a corporation in which all would become stockholders, according to the amounts respectively contributed to its capital stock. Hence, perhaps, the wording of the clause last quoted. If, as the jury were in effect instructed, Arndt became a partner in the firm of Drennen, Starr & Everett prior to the loss, then the character of that firm was essentially changed; for, as partner, he would have become, at and before the proposed corporation was formed, at least as to third parties, a general agent of his co-partners in respect of all matters within the scope and objects of the partnership, with authority, implied from the relation itself, to participate in the control and management of the property, and, in the name of the firm, even to dispose of the entire right of all the partners for partnership purposes. The agreement is not, in our judgment, fairly susceptible of a construction which is attended by such results. The requirement that Arndt was to be received into the business upon the condition, among others, that the company should be incorporated, and the further requirement that neither the name nor the character of the firm was to be changed until the proposed corporation was formed, cannot be satisfied by any other interpretation than one which excludes him from all control or management of, or legal interest in, the property insured, prior to the formation of such corporation.

It is suggested that Arndt would not have paid \$10,000 in cash and notes "into the firm for its use" unless he supposed that he would thereby acquire a present interest in the firm's property. The answer is, that the want of business sagacity in such an arrangement, if such there was, cannot control the interpretation of the written agreement between the parties. Arndt, in effect, agreed to pay Drennen, Starr & Everett \$5,000 on June 14, 1883, and a like

sum on January 1, 1885, with interest on each sum from January 1, 1883, until paid, for the privilege of becoming, to the extent of such payments, a stockholder in a corporation thereafter to be formed, whose capital stock should represent all the effects and rights of that firm, as of the date from which Arndt was to pay interest (less any loss arising from the non-payment of goods previously sold), increased by the \$10,000 which Arndt agreed to pay into the old firm. Such was the whole extent of the agreement.

The instruction by the court below proceeded upon the ground that the payment by Arndt in cash and money of the amount which he agreed to pay, and their receipt and entry upon the books of the firm to his credit, gave him an interest as partner in the business ; whereas such facts only established the performance of some, not of all the conditions prescribed ; for, by the agreement, the formation of the proposed corporation was expressly made a condition, with the others named, to Arndt's becoming interested in the business.

In our judgment, looking at the whole agreement, the parties did not contemplate a partnership, and none was ever established between them. The agreement looked only to a corporation, the payments and other things specified being in preparation for its ultimate formation, which was an adequate, as it was the actual, consideration ; consequently, there was, prior to the loss, and under the most liberal interpretation of the policies, no change in the title or possession of the property, nor any transfer thereof, that avoided the policies.

This is sufficient to dispose of the case. For the reasons given, the judgment must be reversed and a new trial had.

## SUPREME COURT OF ILLINOIS.

*Appeal from the Appellate Court of the Second District, Originally  
Appealed from the Peoria C. C.*

JOHN F. JOHNSON ET AL.

VS.

ELIZABETH L. VAN EPPS.\*

The certificate of a benevolent society provided for the payment to the wife of insured, or his legal representatives. After the death of the wife, with consent of the society, the certificate was canceled, and another issued, payable to a party in no way related to him.

*Held*, That the intention of the insured was that payment should be made to his wife, or in case of her prior death, to his legal representatives, who are ordinarily the executors or administrators, and his rights were the same as if made payable to himself in the absence of children.

*Held*, That he had a right to surrender, and take out a new policy payable to another.

*Held*, That the taking out of a policy and making it payable to one having no insurable interest is not illegal or void on grounds of public policy.

MULKEY, J.

On the first of August, 1872, the Illinois Masons' Benevolent Society, for the consideration therein mentioned, issued under its seal, to H. B. Johnson, of Toulon, this State, a certificate of membership, in the nature of a policy of insurance, whereby said society promised and agreed "to and with the said H. B. Johnson, his heirs, executors, administrators and assigns, well and truly to pay, or cause to be paid, to Judith Johnson, his wife, or the legal representatives of the said H. B. Johnson, within thirty days after due notice and satisfactory evidence of his death," certain sums of money in said certificate or policy specified. Mrs. Judith Johnson

\* Opinion filed May 19, 1884.

having previously died, the society on the 17th of January, 1880, at the request of the assured, and upon his representation that Mrs. Elizabeth Van Epps, of Peoria, Illinois, was then his affianced, canceled the above certificate of insurance, and issued another to him of that date, substantially the same as the first, except that it was made payable to the said Mrs. Elizabeth L. Van Epps, or the heirs of the said H. B. Johnson. At the time of issuing the new certificate, certain indorsements were made upon the old one. Across the face was written :—

“Canceled—null and void—new certificate, January 17, 1880.”  
On the back was the following :—

“On the 17th day of January, 1880, the within certificate was surrendered to the Illinois Masons’ Benevolent Society, at my request, and a new one of that date issued, with benefit payable to Mrs. Elizabeth L. Van Epps, my affianced. I have no children.

“H. B. JOHNSON.

“Formerly of Toulon, Stark County, Illinois.”

At the date of this transaction, Mrs. Van Epps was a married woman, though living apart from her husband, from whom she was divorced on the 6th of October following. The evidence tends to show that prior to the above transaction, the assured was an occasional guest or lodger in the house of Mrs. Van Epps, and that, during the year 1880, his health having become precarious, he changed his residence to Peoria, and became a permanent lodger in her house, where he was taken care of and supported by her until the time of his death, which occurred on the 25th of October, 1881. The deceased left no children or descendants of children, the appellants being his collateral heirs only. Upon Johnson’s death, the company having been notified by appellants not to pay to Mrs. Van Epps the amount due under the policy, payment was accordingly withheld until their respective rights could be determined. The company thereupon filed the present bill of interpleader, to compel them to litigate their title to the fund in question, which amounts to \$4,160.41. The company has brought this sum into court, that it may be paid to the successful claimants, whoever they may be. Upon the hearing of the cause, the court found Mrs. Van Epps entitled to the fund, and entered a decree accordingly, which, on appeal, was affirmed by the appellate court for the second district, and the heirs bring the record here for review. After



a careful consideration of the evidence in this case, we do not feel inclined to disturb the decree, unless some imperative rule of law demands it. The proofs satisfactorily show that Johnson, after the death of his wife, by reason of the loss of health, and consequent travel in attempting to regain it, became financially in very straitened circumstances,—so much so that he was in effect forced to make some disposition of his certificate or policy of insurance, or suffer it to lapse for non-payment of assessments. Under the circumstances he “entered into arrangements with Mrs. Van Epps, whereby she was to pay all assessments, furnish him a home, and take care of him in case of sickness,” in consideration of which she was to receive the proceeds of the policy upon his death. In pursuance of this understanding, the old certificate was taken up and canceled and a new one issued, as already stated. This agreement has been faithfully executed on her part. The evidence shows that after the change in the certificates, all assessments, amounting in the aggregate to \$165.20, were paid by her; that she furnished the deceased with a comfortable home, supported and nursed him through a long period of suffering and prostration that preceded his death. Whatever may be the legal aspects of the case, it must be conceded Mrs. Van Epps, on the principle of natural justice, has a strong claim on the fund in dispute. But, of course, these principles, of themselves, cannot avail, as the rights of the parties to this, as well as to all other legal controversies, must be determined according to the positive law of the State, whether that law entirely coincides with our notions of natural equity or not. The question then is, when thus tested, what are the legal rights of the parties.

The first proposition assumed by appellants, as stated in their own language, is: “That immediately upon the issuance of the first policy, payable to ‘Judith Johnson,’ or to the legal representatives of H. B. Johnson, the right of said beneficiaries became vested and could not be divested in any way without their consent. The property or ownership of the policy, was in the beneficiaries and beyond the control of Johnson, the insured, and he could do no act to divest or transfer it from them to other parties.” Numerous authorities are cited as sustaining the view thus stated, among which are the following: Bliss on Insurance, sec. 317; May on Insurance, secs. 390, 391; Continental Life Ins. Co. vs. Palmer, 42 Conn., 60; Chapin vs. Fellows, 36 id., 132; Gould vs. Emerson, 99 Mass., 154; Glanz vs. Gloeckler, 104 Ill., 513.

With respect to the cases cited, appellee contends they are in the

main, if not altogether, based upon the statutes of the several States in which they arose, and not upon common-law principles. It is also claimed the text of *May and Bliss* is founded solely upon these cases, and hence it is concluded the authorities cited can have no effect in this case. It is further claimed by appellee that, in the absence of any statutory provision controlling the question, the rule contended for by appellant is applicable only where the policy is taken out by the beneficiary, and not by the party whose life is insured,—or, in other words, only when the contract of insurance is between the beneficiary and the insurer, as, where a wife or child takes out a policy on the life of the husband or father, as in the case of *Glanz vs. Gloeckler*, 104 Ill., 573, above cited ; that the rule has no application where one takes out a policy in his own name, for the benefit of his wife or child, as was the case here ; that in such case, the contract being between the insurer and the party whose life is insured, so long as the latter retains possession of the policy he has the right, with the consent of the insurer, to change the contract of insurance so as to give the proceeds of the policy, upon his death, to a different beneficiary, or to change it in any other manner the contracting parties may agree upon, not contrary to law or good morals. That this position is supported by many analogies of the law, as well as by express adjudications, must be conceded : *Clark vs. Durand*, 12 Wis., 248 ; *Kerman vs. Howard*, 23 id., 108 ; *Foster vs. Gill*, 50 id., 603 ; and *Gambbs vs. Mutual Life Ins. Co.*, 50 Mo., 44 ; and assuming it to be the law, the decree in this case is clearly right. But whether, as a general proposition, this be the correct view or not, we do not regard as material to the decision of this case, and we shall therefore not stop to consider it, as the conclusion to be reached will be placed on a different ground.

If, as claimed by appellants, where one takes out a policy on his own life for the benefit of another, the latter at once acquires a vested interest therein which cannot be defeated by any act of the assured or insurer, or by the combined action of both, it would seem to follow such an interest would not be defeated by the death of the beneficiary in the lifetime of the assured, but that in such case the right thus vested in the policy would pass, like any other chattel interest, to the executor or administrator of the beneficiary, so that if it be assumed the interest in the first certificate of insurance upon being issued, at once vested in Mrs. Johnson, and the rule suggested be applied to the present case, it is clear the right to the proceeds of the policy is in her personal representatives, and not in the appel-

lants, which, of course, would be fatal to their claim. They are therefore forced to the position that upon the death of Mrs. Johnson, the first beneficiary in the order of limitation, and all persons claiming through her, ceased to have any interest in the policy or its proceeds, and it seems to be now conceded by both parties to this appeal that the instrument in question must be now construed in the same way it would be if Mrs. Johnson's name had never appeared in it as a beneficiary. It is manifest, as already remarked, any other view would be fatal to the claim of appellants. Striking out the name of Mrs. Johnson as a beneficiary, the policy or certificate would then be payable to "the legal representatives of the said H. B. Johnson." And the question for determination is, What construction should a policy receive thus drawn? If, by the expression "legal representatives," is meant the executor or administrator of Johnson, which is the ordinary meaning attached to it, it is clear appellants did not, as contended by their counsel, take an immediate vested interest in the policy at the time it was issued, and if they took none then, it will hardly be contended they have any now. The doctrine seems to be well recognized that the words "legal representatives," when used to indicate those entitled by law to a decedent's personal estate, as was the case here, uniformly mean, where there is nothing in the context or surrounding circumstances to indicate a contrary intention, "executors and administrators." *Loose vs. John Hancock Life Ins. Co.*, 41 Mo., 538. In 2 Jarman on Wills, sec. 649, the author, referring to the expressions "legal representatives" and "personal representatives," says: "Each of these terms in its strict literal acceptation, evidently means executors or administrators, who are, properly speaking, the 'personal representatives' of their deceased testator or intestate.

We fail to discover anything in the certificate to indicate the expression "legal representatives," was used out of its ordinary and appropriate sense; nor do we perceive anything in the surroundings or circumstances attending the transaction to warrant the conclusion the expression in question was used in any other sense than that of "executors" or "administrators." On the contrary, we are of the opinion the circumstances rather strengthen the view it was used in its ordinary and appropriate sense, as above stated. Judging from Johnson's pecuniary circumstances at the time of his death, it is probable he was a man of limited means when the first certificate was issued. He was without children, and outside of his wife he had no relations that he was under any obligation to maintain or

provide for. His highest duty, therefore, in disposing of the proceeds of the certificate of insurance, was to first provide for his wife, and for such as might have just claims against his estate in the event he survived her, and this, we think, he accomplished by limiting the proceeds of the certificate in the manner he did. In short, we think, so far as the first certificate is concerned, it was the intention of Johnson that his wife should have the proceeds in the event she survived him, but in case she did not, such proceeds were to then go to his executor or administrator, to be distributed in due course of administration. This view is, of course, fatal to appellants' claim. Whatever may have been the right of Johnson with respect to the policy before the death of his wife,—about which we express no opinion,—we have no hesitancy in holding that after that event he had the same power over it as if it had originally been made payable to himself, "his executors and administrators," in which case, of course, he would, at any time during his life, with the consent of the company, have had the right to surrender it, and take out another, making a different disposition of the proceeds, as was done in this case.

The taking out of the new certificate was, under the circumstances of this case, in legal effect the taking out of a new policy; and that it was competent for the contracting parties to do so, under the circumstances of this case, is fully shown by the case of *Swift vs. Mutual Aid Society*, 96 Ill., 309. We cite, also, in this connection, *Cole vs. Marple*, 98 Ill., 58; *Mutual Benefit Life Ins. Co. vs. Atwood*, 24 Gratt., 497; *Mutual Life Ins. Co. vs. Coghill*, 30 id., 72; *Doll vs. Lincoln*, 31 Maine, 428.

Judgment affirmed.

Dissenting opinion by *SHELDON, J.*

I regard the provisions for payment to Mrs. Van Epps as void, as being repugnant to the whole purpose and design of the association, as set forth in its constitution and by-laws. Article 2 of its constitution declares: "The business and object of this society shall be to give financial aid and benefit to the widows, orphans and heirs, or devisees of deceased members." A section of its by-laws declares: "The business and object of this society shall be to afford financial aid and benefit to the widows, orphans, heirs, and devisees only, of its deceased members." The latitude allowable in the case of insurance companies in making policies of insurance for the benefit of

others, is not, consequently, admissible in such a case as this, as our statute in respect to "corporations not for pecuniary profit," declares: "Associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, \* \* \* shall not be deemed insurance companies."

A petition for rehearing having been filed, and the same being duly considered by the court, the following additional opinion was filed :—

PER CURIAM.

The point is made in the petition for a rehearing, that the law will not sanction any contract or other engagement which has a tendency to the commission of crime, and it is claimed the insuring of one's own life for the benefit of a stranger has such a tendency—hence it is concluded the certificate of insurance to Johnson, for the benefit of Mrs. Van Epps, is void. Viewing this as an original question, there is certainly but little, if any, force in it, so far as it is supposed to be applicable to the case in hand. It is an every-day occurrence for persons to make wills containing bequests to mere strangers having notice of their provisions, and yet the validity of such wills has never been questioned on the ground suggested. So, it is not infrequently that contracts are made to pay sums of money upon the death of a specified person. So, it is a part of every-day experience to convey lands to one for life, with remainder in fee to another, and the validity of these transactions has certainly never been doubted on the ground suggested ; and yet the temptation of the beneficiary to accelerate the enjoyment of property thus limited, by taking life, is just as strong in either of the cases mentioned as in the case before us.

Upon the record before us, however, we deem it wholly unnecessary to inquire whether the claim of Mrs Van Epps stands upon the same footing that one confessedly founded upon a wager policy does, as is claimed to be the case by appellants ; for the result, let the question be decided as it may, is all the same, and equally fatal to their rights to maintain this appeal. The company has brought the fund in dispute into court, for the express purpose of discharging its liability on the certificate or policy payable to Mrs. Van Epps, and sets forth in its bill that the former certificate was, at the request of Johnson in his lifetime, taken up and canceled by the company, and consequently now has no existence. These facts are not denied by appellants, but are admitted upon the record to be

true, and the only shadow of claim they have, or claim to have, to the fund in question, must be worked out through the present certificate, which is expressly payable to Mrs. Van Epps, and the by-laws of the company or society, in express terms, as well as the laws of the State, if the certificate has any legal effect at all, require the fund to be paid to "the beneficiaries named in the certificate."

If the requirement of the by-laws is to be observed, this money of course, must be paid to Mrs. Van Epps. But for the purpose of defeating her claim, appellants, as we have just seen, say the making of the certificate payable to her was not authorized by law—that such a contract is in the nature of a wagering policy, and is consequently void, as against public policy. Conceding, for the purposes of the argument, this is so, and that the decree for this reason is erroneous, it does not necessarily follow the decree should be reversed at the instance of appellants, for that reason. The argument is like a two-edge sword, its cuts both ways. It proves too much. As it has been fully shown the alleged rights under it, for no one can acquire rights under a void instrument, and it is hardly necessary to add, one will not be heard to complain of an error that does not injuriously affect some right of his. Assuming appellants' hypothesis to be true, the company or society alone would have the right to complain. But it is entirely content, and makes no objection whatever to the payment of the money on the ground suggested.

In any view, appellants have no right to the proceeds of the certificate in question.

## UNITED STATES CIRCUIT COURT OF CONNECTICUT.

HEUSSER

vs.

CONTINENTAL LIFE INS. CO.\*

Where annual dividends are declared by a life insurance company, in accordance with an established rule, and the acts of the officers show that they are payable on certain classes of policies, a subsequent attempt on its part to limit the meaning of the vote, and make it at variance with the contemporaneous written rules and the acts of the company, is vain, the attempt being evidenced by the erasure of the dividend indorsement from the premium notes, and the company will be liable for the amount of the dividends so erased.

The office of a renewal of a life insurance is to prevent discontinuance or forfeiture; and the word "renewed," in the vote of the directors of an insurance company granting dividends upon certain policies answering this description, includes participating, limited-payment policies, which have been prevented from forfeiture prior to the passage of the dividend.

CHARLES J. COLE, *for Plaintiff.*

CHARLES E. PERKINS, *for Defendant.*

SHIPMAN, J.

This is an action at law which was tried by the court, the parties having, by a duly signed, written stipulation, waived a trial by jury. The facts which are found to have been proved, and to be true, are the following :—

On April 4, 1867, in consideration, among other things, of the annual premium of \$386.90 in hand paid, and to be paid, to the defendant by Susan Heusser, the wife of the plaintiff, on or before the fourth day of April in each and every year, during the term of fifteen years, the defendant, a life insurance company duly incorporated

\* Decision rendered May 12, 1884. From *Federal Reporter*.

and located in Hartford, Connecticut, made its policy of insurance in writing, and thereby assured the life of the plaintiff, now of Syracuse, New York, in the amount of \$5,000. In and by said policy of insurance, it was agreed that if, after the receipt by said company of not less than two annual premiums, default should be made in the payment of any subsequent premium, said policy should then be binding on said company for as many fifteenth parts of the sum originally insured as there should have been complete annual premiums paid, without subjecting the assured to any subsequent charge, and that if the plaintiff should survive until April 4, 1882, the amount insured should be paid to him, deducting therefrom all his indebtedness to the company, if any, then existing. Five consecutive annual premiums were paid by Susan Heusser to the defendant upon said policy. Said payments of premium ceased on April 4, 1871. On April 4, 1882, Henry Heusser was, and still is living. One half of each annual premium was paid in cash, and one half was paid by note of Henry Heusser, the interest being paid in advance. On April 4, 1882, the defendant held, and still holds, four of said notes, each for \$193.45, and dated on April 4th, in the years 1867, 1868, 1869, and 1870, respectively, each payable twelve months after date to the order of the defendant, with interest, and each having been given for one half of the premiums which were payable at the respective dates of said notes. On the first note, the following indorsement had been made, dated April 4, 1872: "Received on the within note one hundred and thirty-five 75-100 dollars, dividend." On the second note, the same indorsement had been made, dated April 4, 1873. On the third note, the following indorsement had been made, dated April 4, 1874: "Received on the within note thirty 20-100 dollars dividend." Each one of said indorsements was, in 1880, erased by lines drawn through them, respectively, by the secretary of the company, who also added the words, "Error—no dividend." This was done with the knowledge and approval of the directors. These indorsements were made by the direction or under the instructions of the president or secretary of the company, in the usual course of business, and, as was supposed, by authority of the following votes of the directors of said company, the first having been passed February 6, 1871, the second on February 19, 1872, and the third on December, 2, 1873:—

"Voted, that a dividend from the surplus of the company of 50 per cent upon life policies entitled to participate in the profits which were issued prior to January 1, 1869, and of 40 per cent upon en-



dowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1868, when renewed previous to January 1, 1873."

"Voted, that a dividend from the surplus of the company of 50 per cent upon life policies entitled to participate in the profits, which were issued prior to January 1, 1870, and of 40 per cent upon endowment policies of the same year, be declared and made payable, in accordance with the rules of the company, upon premiums paid in 1869, when renewed previous to January 1, 1874."

"Voted, that a dividend be, and hereby is, declared to those policyholders entitled to participate in the profits of the company, payable January 1st next, and thereafter during the year ending December 31, 1874, as the several policies may be renewed, in accordance with the contribution of each to the surplus, using the following assumption. \* \* \*"

Indorsements like those made upon the notes in question were made, when the interest was paid, and not otherwise, upon all premium notes upon this class of endowment, non-forfeitable, participating policies, which had lapsed in part, but which were existing policies at the time the indorsements were made, and which, in other respects, were included within the provisions of said respective votes. If the interest was not paid upon a note, no indorsement was made. About 40 per cent of such notes received the indorsement in 1872 and in 1873, and a much less proportion in 1874. There was no difference in the policies pertaining to the notes which received and which did not receive the indorsement, except that in the former case the interest had been paid upon the notes, and in the latter it had not been paid. Similar erasures were made by the secretary, after the year 1880, upon all similarly indorsed premium notes belonging to this class of policies, when the policies upon which the notes were given matured and became payable.

The following statement was contained in the prospectus of the defendant, which was prepared by the secretary of the company in 1868, and was circulated among the agents and policy-holders:—

"On all participating policies dividends will be paid annually, commencing four years after the payment of the first premium, although when credit is given for part of the premium they are practically available in advance, lessening each annual payment. They will be paid in cash when the full premium is paid in cash, or applied to cancel the notes of those who elect to have credit for one half; and, in the settlement of a policy, a dividend will be allowed on

each premium which has been in possession of the company for a full year, and on which no dividend has been paid.

"Dividends based upon the rate paid will cease when they equal the payments in number; if based upon the ordinary life rate, they will continue during life; and if on the endowment rate, during the existence of the policy. If the annual premiums on limited-payment policies are discontinued before the specified number have been paid, the dividends thereafter will be based on the continued rate for the same kind of insurance and will continue until the number of dividends equals the number of annual premiums paid."

The first of said paragraphs was repeated in another circular, which was prepared by the company for distribution and was circulated. The dividends of 1872 and 1873 were computed according to the rule stated in the first part of the third paragraph. These three paragraphs contained the company's regulations or rules prescribed for the management of dividends, and the practice of the company continued to be in accordance therewith, at least until 1876. The amount of dividends which were paid during the years 1872, 1873, and 1874, and which included the indorsements in question, was annually reported to the stockholders of the company. It is admitted that one other and subsequent dividend of \$31.21 was properly indorsed upon the fourth note. The interest upon the amount of the notes, as they were diminished by all said indorsements, was demanded by the secretary after said erasure, the circular stating the amount of the notes to be \$440.86 and was paid to April 4, 1882. This fact is not material upon the construction of the said three votes, and was not admitted for that purpose.

The only question in the case is whether the amount of the three erased indorsements should be deducted from the amount claimed by the defendant to have been due upon said notes on April 4, 1882. This question depends upon the construction to be given to the word "renewed" in the three votes which have been quoted. For example, in the vote of February, 1871, the dividend is declared upon premiums paid in 1868, when the policies are "renewed" previous to January 1, 1873. The defendant says that this language can refer only to policies which are renewed or prevented from forfeiture by the payment of a premium, and, as a non-forfeitable endowment policy, which had lapsed pro rata, but which was a paid-up policy for a portion of the amount originally assured, was not continued in force or prevented from forfeiture by the payment of an annual premium; that the word "renewed" did not apply to such a

policy. The plaintiff insists that no such literal meaning is to be given to the language, but that the vote is to be construed in harmony with the contemporaneous written rules of the company, and that the contemporaneous acts of the company, in accordance with the rules, should have an influence in determining what was meant by the votes.

It certainly appears from the printed prospectus that a dividend was promised to be allowed in the settlement of a policy upon each premium which had been in the possession of the company for a year; and that, notwithstanding annual premiums on limited-payment policies had been discontinued before the specified number had been paid, it was understood that dividends thereafter, based on the continued rate for that kind of insurance, would continue until the number of dividends equaled the number of annual premiums paid. This rule declares the intended practice of the company. If the vote is to be construed as confined to policies which are prevented from forfeiture by the prompt payment of an annual premium, such a construction would not be in harmony with the rule of the company, and would also be contrary to its uniform practice when the interest upon the premium notes had been paid. Annual dividends were declared in accordance with the rule, and the officers showed by their acts that the intent of the votes was to make the dividends applicable to this policy and to all others in like circumstances. The attempt of the company in erasing these indorsements was to place, in 1880, for its own advantage, a limited meaning upon the language of the votes of 1871, 1872, and 1873, when such meaning was at variance with the contemporaneous written rules and with the contemporaneous acts of the company.

The office of a "renewal," as it is termed, of a life policy is to prevent discontinuance or forfeiture, and by the word "renewed," the respective votes meant to include, and did include, participating, limited-payment policies which had been prevented from forfeiture prior to the dates respectively mentioned.

Let judgment be entered for the plaintiff for \$1,225.80, with interest from April 4, 1882.

SUPREME COURT OF MICHIGAN.

SCHMIDT

vs.

MUT. CITY & VILLAGE FIRE INS. CO.\*

The building was estimated in the application, which was a warranty, to be worth \$550. The charter, which was part of the contract, allowed only three fourths of the value to be paid. The insurance was for \$400. The actual value, as found by the jury, was \$366.66.

*Held*, That there was not an over-valuation which would work a forfeiture.

The insured may recover for personal property not included in proofs, if he has done nothing prejudicial to such recovery in connection with the proofs.

E. M. PLIMPTON (CLAPP & BRIDGMAN, of Counsel), *for Plaintiff*.

O. W. COOLIDGE and EDWARD BACON, *for Defendant and Appellant*.

CHAMPLIN, J.

Plaintiff insured his house and household furniture, clothing and provision therein, in defendant company. The house he valued in the application at \$500, insured for \$400, and the personal property was valued in the policy at \$400, and insured for \$300. The house and a portion of its contents were destroyed by fire on the thirteenth, or morning of the fourteenth of January, A. D. 1882. The officers of the company seem to have entertained the opinion that the house was burned by plaintiff to defraud the company, and refusing to pay the loss this suit was brought upon the policy. The defendant pleaded the general issue, and gave notice that on the trial it would introduce evidence to show that the fire alleged in plaintiff's declaration was caused by the fraudulent act of the

\* Opinion filed January 7, 1885.

plaintiff, with intent to injure and defraud the defendant. The trial resulted in a verdict for plaintiff, and the defendant brings the case into this court, and assigns 27 errors. Six of these refer to rulings of the court in the admission of testimony, and the remainder to alleged error of the court in charging and refusing to charge the jury as requested. We consider it unnecessary to specify with particularity the errors assigned upon the admission of testimony. It is sufficient to say that we have examined them with care, and are satisfied that none of them are well taken; and the same may be said with respect to those which are based upon the charge of the court as given.

The issue to be tried under the notice given in accordance with circuit court rule No. 104 was brought within a narrow compass, as matter of defense, after plaintiff had made his case. And we see from the record before us that the defendant introduced testimony upon the point set up in its notice. Defendant's counsel now claims that the building was over-valued in the application and policy, as shown by the testimony of actual value produced upon the trial, and that such over-valuation constituted a warranty, and, if not correct, avoided the policy. The application states the estimated value at \$550, and the insurance applied for \$400, and it was insured upon the latter basis. It also states that the application is to be deemed a warranty of the facts stated therein, and a part of the contract of insurance. The charter and by-laws are also made a part of the contract of insurance. Section 18 of the charter reads as follows: "Sec. 18. This company will pay three fourths of the actual value of the buildings at the time of burning, and also three fourths of the cash value of personal property insured or of the damage done thereto, provided they are insured to that amount. But if the insurance is equal to or greater than the actual value of the insured property, the insured will not be entitled to more than the said three fourths of the actual value, as determined by the board of directors."

Construing the application and this section of the charter together as part of one contract, it is not perceived how any over-valuation can become material. The charter guards against over-valuation, by providing in such case the company shall only pay three fourths of the actual value at the time of the loss, not that it shall be entirely exonerated from payment. The only clause with reference to forfeiture is at the close of section 10 of the by-laws, which reads: "If there be any fraud or false swearing, with fraudulent intent, the

claimant shall forfeit all claims by virtue of the policy for such loss." This refers to representations required to be made in that section after a loss has occurred, and with reference thereto. The testimony as to actual value ranged from \$150 to \$500, and counsel for defendant submitted a question to the jury to find the actual value at the time of the fire, and in answer they found it to have been \$366.66. If the policy had contained provisions to the effect that over-insurance would render it void, it would seem like splitting hairs to say that a man's judgment of the value of his building which fell \$33.34 short of that placed upon it by the verdict of a jury, based upon the judgment of several witnesses, constituted a breach of warranty of value. Besides, this statement of value was made by the plaintiff in September, 1879, and there may have been, and very likely was, some depreciation in value at the time it was burned, in January, 1882.

The defendant's counsel requested the court to instruct the jury as follows : (1) In this cause it is not necessary for the defendant to prove the plaintiff's fraudulent act beyond reasonable doubt ; there is no need of more than a preponderance of evidence. (2) In this cause the jury ought to find for the defendant on any issue where there is a preponderance of evidence in favor of the defendant. (3) The estimated value set down in the application signed by Frederick Schmidt are his estimates and not the estimates of the defendant. (4) No estimate of value set down in the application signed by the plaintiff is, by virtue of said application, any more than the plaintiff's own estimate. (5) The plaintiff cannot recover in this action more than three fourths of what, at the time of the fire, was the cash value, or so much of the insured property as was burned. (6) The defendant is not estopped by any valuation of the insured property, set down in the policy or application, from showing its actual value at the time of the fire by any legal evidence. (7) The measure of value which must govern in this case is the fair market value at the time of the fire. (8) The jury are to determine the value of property in this case according to the fair market value at the time of the fire. (9) No valuation at the date of the issuing of the policy is to govern in this case. (10) The charter and by-laws printed in the policy are a part of the contract of insurance in this case, and the plaintiff is bound thereby. (11) This is a civil and not a criminal case, and the rule of evidence in this case differs from the rule in a criminal case in this : that in a criminal case guilt must be proved beyond any reasonable doubt, but in this case it is

sufficient to prove by a preponderance of evidence only the fraudulent act of the defendant alleged in the notice adjoined to the plea. (12) The plaintiff cannot recover unless he has proved by a preponderance of evidence that he has used due diligence to save; all property exposed to loss at the time of the fire. (13) The plaintiff cannot recover if it appears by the preponderance of evidence that, at the time of the fire, the plaintiff did not use due diligence to save all property exposed to loss at the time of the fire. (14) In this case, mere neglect of duty to use due diligence, to save all of the insured property exposed, can defeat the plaintiff's right to recover anything. (15) The defendant is a mutual company; the plaintiff was a member of the company, and by the contract of insurance in this case, was bound to comply with all that the same required of him. (16) The charter and by-laws in this case form part of a special contract between the parties. (17) If the jury find that the plaintiff, in presenting his claim to the defendant, was guilty of any fraud or false swearing, with fraudulent intent, then the plaintiff cannot recover anything in this suit. (18) In this case the plaintiff, by false swearing with fraudulent intent, can forfeit his claim to any recovery. (19) In this case the plaintiff can by fraud forfeit his claim to any recovery. (20) The plaintiff is estopped by his proof of loss, and cannot recover in this action for any article or articles of personal property not mentioned in his proof of loss. (21) If the house accidentally caught on fire, and the plaintiff, when he could thereafter have had the fire out by the exercise of ordinary diligence, fraudulently contrived or allowed the house to be destroyed by fire, and fraudulently desisted from the exercise of ordinary diligence, the plaintiff cannot recover. (22) As to the personal property burned, the plaintiff can recover for the same no more than three quarters of the cash value thereof at the time of the fire. The cash value in the charter means the cash value in the market at the time of the fire.

All of which were granted and given to the jury excepting the following: "The plaintiff is estopped by his proof of loss, and cannot recover in this action for any article or articles of personal property not mentioned in his proofs of loss." To the refusal to give this request defendant duly excepted, and has assigned error thereon. There is hardly room for the doctrine of estoppel to apply for the cause stated in the request. A person is estopped to show the existence of a fact when, by his act, declarations, or conduct, it is against conscience that he should be permitted to show the truth.

In order to preclude the party, the opposite party must have done some act or changed his situation in reliance upon the statement or conduct of the party to be estopped. But the defendant has done nothing upon the faith of the proofs of loss by which they would be prejudiced if some articles were proven on the trial to have been lost, which were not enumerated in the proofs of loss made out and forwarded to the company. The ruling of the circuit court was correct. The jury have passed upon the testimony in the case under proper instructions from the court, and the judgment based upon their verdict must be affirmed.

The other justices concurred.



## UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT, NEW YORK.

EDWARDS

vs.

TRAVELERS LIFE INS. CO.\* )

Death resulting from poison taken by mistake is not within the provision of a policy, that it should be void in case of death "by suicide, whether the act be voluntary or involuntary."

Where a receipt is offered in evidence without the policy, which, however, was subsequently offered, the mistake, if any, was cured.

Where the plaintiff is misled by the defendant in regard to furnishing of proofs, and no objections were made to their tardiness when received, the company cannot set up that they were too late at the trial.

WILLIAM N. COGSWELL, *for Plaintiff.*

HENRY M. FIELD, *for Defendant.*

Motion for new trial.

COXE, J.

This action is upon a policy of life insurance. At the January circuit the plaintiff had a verdict. The defendant now moves for a new trial. On the trial, the principal contention had reference to the defense of suicide. The defendant succeeded in proving that the insured died in circumstances peculiar and suspicious in many of their aspects. The precise cause of death was left to conjecture. Stated as strongly for the defendant as the evidence warrants, the facts were, perhaps, sufficient, had the jury adopted the defendant's theory, to justify them in the presumption that the insured took his

\* Decision rendered June 27, 1884.

own life. They did not so find, and their verdict must be regarded as conclusive upon this issue.

It is insisted that the court should have charged, as requested, that the evidence was clear and positive that the insured committed suicide. I cannot adopt this view. The evidence was not clear and positive. The insured might have died from the effects of poison, and he might have died from apoplexy produced by excessive heat. Defendants proved that ninety-six hours after death prussic acid was found in his stomach. Whether there was enough to produce death could only be presumed. No quantitative test was made. Assuming, however, that he died from prussic acid poisoning, there was no evidence as to how it was taken or that it was taken knowingly. But it is argued that whether taken ignorantly or designedly is wholly immaterial, and that the court fell into error in charging the jury that in order to reach a verdict for defendant they must find not only that there was poison sufficient to cause death, but also that the insured took it knowingly and not by mistake. No authority is produced sustaining this position, which seems wholly at variance with justice and common sense. Test it by an illustration. A sportsman is shot to death by the accidental discharge of his own fowling-piece; a woodman is killed by the premature fall of a tree which he himself has felled; an infectious cut from his own scalpel causes the death of an anatomist. Strictly speaking, each dies by his own hand, but can it be seriously maintained that a life policy providing that it shall be void if the insured "shall die by suicide, whether the act be voluntary or involuntary," would be avoided in such circumstances? No court has yet enunciated a doctrine so untenable, and it is believed never will. Life insurance is intended to cover just such risks; its chief benefits are found in cases of sudden death. But the precise question was determined by the court of appeals of this State in *Penfold vs. Universal Life Ins. Co.*, 85 N. Y., 317.

The plaintiff offered in evidence a receipt for the first annual premium, but, relying on certain admissions of the answer, did not produce the policy of insurance. Defendant objected to the receipt unless read in connection with the policy, and the refusal of the court to so rule is alleged as error. The answer is twofold: First, it was not incumbent on the plaintiff under the pleadings to produce the policy; and, second, the question at best relates only to the order of proof, and as the policy was subsequently offered and the jury properly instructed as to the burden of proof, the mistake was cured,

assuming that there was a mistake. A new trial will hardly be granted because the defendant offered in evidence a paper which the plaintiff should have offered.

It is also argued that there was a fraudulent concealment of certain facts by the plaintiff, and that the court should have so declared. Regarding this proposition, it is sufficient to say that all the evidence there was upon this subject, and there was but little, was submitted to the jury with instructions as favorable to the defendant as it could fairly ask.

The other defenses are of a formal and technical character, and relate to the alleged failure of the plaintiff to give immediate notice in writing of the death of the insured, and to furnish proofs of death in accordance with the strict letter of the contract. No attempt will be made to conceal the fact that such defenses do not commend themselves to the court. They in no way involve the merits, and it is not easy to see how the omissions referred to injured the defendant or impaired any of its rights. True, the parties entered understandingly into the agreement, and if the court is clearly satisfied that it has been violated, even in an apparently unimportant particular, it should so say. But, where a life insurance company seeks to avoid the sacred obligation which it has assumed, because, for instance, a fact is communicated to it orally instead of in writing, the court should be very sure of the rectitude of such a defense before permitting it to succeed. These policies are prepared with great care by those in the companies' employ, they are surrounded by agreements and warranties innumerable—a labyrinth of conditions, where one heedless or uninformed may easily go astray. To construe them narrowly and illiberally is not the policy of the courts. A strict construction would often work injustice to both parties alike. To the insured, by permitting non-essentials to defeat an equitable claim ; to the insurer, by shaking the confidence of the people in the system of life insurance.

The condition here alleged to have been violated is in these words: "That in the event of the death of the person insured, then the party assured, or his or her legal representatives, shall give immediate notice, in writing, to the company, at Hartford, Connecticut, stating the time, place and cause of death, and shall within seven months thereafter, by direct and reliable evidence, furnish the company with proofs of the same, giving full particulars, without fraud or concealment of any kind."

The facts are as follows :—

The insured died June 19, 1882. A day or two afterwards E. M. Phillips, who is described in the receipt referred to as "agent of this company at Southbridge, Massachusetts," met one of the family of the deceased on the street, informed him that he was going to Hartford, and would give the company the requisite notice and procure the necessary blanks for the proofs of death. He did go to Hartford on or about the twenty-first of June, saw the secretary of the company, gave him notice of the death, stating all the particulars which he then knew, and obtained the blank proofs. On his return, he handed the blanks to one of the plaintiff's representatives, saying at the time, "When you get them completed I want you to return them to me." They were filled out and delivered to him July 3, 1882. He retained them for several months and then returned them to a brother of the plaintiff saying that they were incomplete, and demanded additional information. On the twenty-ninth of January, 1883, they were again delivered to Phillips, and by him sent to the company on or about the seventh of February. The company, in acknowledging the receipt of the proofs, made no objection that they were received too late and retained them in its possession; they were produced on the trial by the defendant's counsel.

It must be held that, if the plaintiff has not followed the contract literally in these particulars, it was because she was misled by the course of defendant, and that the defendant is not now in a position to take advantage of the plaintiff's omissions, having waived a strict performance of the contract.

I have examined other exceptions argued, but do not think any of them well taken.

The motion for a new trial is denied.

## SUPREME COURT OF MICHIGAN.

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*Error to Mason.*

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SHACKELTON

vs.

SUN FIRE OFFICE.\*

After the premises had been vacated by the tenant, the owner desiring to occupy them, moved in her furniture, and proceeded to clean them while stopping near by, but being called away temporarily on business, she placed them in charge of one who had an interest in them, and they were burned during her absence.

*Held*, That the house was not vacant within the meaning of the policy.

J. B. McMAHON, *for Plaintiff*.

HAMMOND & BARKWORTH, *for Defendant and Appellant*.

COOLEY, C. J.

The plaintiff sues as assignee of a policy of insurance issued by the defendant to Emma Norton, and insuring her against loss or damage by fire or by lightning, to the amount of \$400, on her frame dwelling-house in Ludington, described in the policy as occupied by a tenant. One of the conditions of the policy was that "this policy shall become void unless consent in writing is indorsed hereon by or on behalf of the society, if any building hereby insured be or become vacant or unoccupied for the purpose indicated in this contract, or become occupied in whole or in part for other and more hazardous purposes than those indicated in this contract." Upon this condition the present controversy arises. The policy bore date

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\* Opinion filed November 19, 1884.

May 7, 1883, and was for one year. The insured testified on the trial that her tenant left the house June 19, 1883. She was glad of this, because she wanted to occupy the house herself. She immediately moved her things into it; her furniture and all the goods she had. She was there in the house, occupied it, and expected to make it her home. She was getting ready, cleaning up, and doing all she could; her husband was sick, and she could only clean a little at a time, as she could not leave her husband long. On June 20th, she started to take her husband to the dispensary at Chicago, and was gone not to exceed three days. She then stayed at home five or six days, leaving her things in the house all the while, but not staying there nights. Her father lived about 40 rods away, and she stayed nights and took meals at his residence. The witness also had work done in the garden attached to the house. Some five or six days after her return from Chicago witness went away to canvass for certain goods which she sold, and which were principally hair-work. She went for this purpose into northeastern Michigan, and the house was burned July 4, 1883, before her return. On going away she put the premises in charge of Mr. Shackelton, who had an interest in them.

Upon this evidence, and some other not material to be here mentioned, the trial judge instructed the jury that "if a man insures his dwelling-house and lives therein at the time, and contracts not to let the building become vacant and unoccupied, he cannot, as a matter of fact, vacate it, absolutely leave it in that condition, and recover on a policy in case of loss. But if he goes off temporarily on business or matters for his own benefit, or otherwise—temporarily, merely, with the intention of coming back to his place and there living, and with no intention of abandoning the place—the contract will not be vitiated by that kind of a transaction. And had the tenant in this case gone away on temporary business before he surrendered up the premises to this Mrs. Norton, and had the fire occurred while the tenant occupied it, there would be no question but that the company would be responsible for the loss if the going away was merely temporary, with the intention of coming back and making it the home of the tenant. I think, in this case, gentlemen, if you are satisfied by a fair preponderance of the evidence in this case, or are clearly convinced that Mrs. Norton put her things into that building with the intention of making it her home and her residence, as a matter of fact; didn't live in it in person before the fire, but after placing those things in she went away on mere temporary

business, with the intention in her mind to come back and live there—that the premises would not be unoccupied and vacant within the meaning of this policy, and that the company would be responsible for the loss. She must, of course, have placed her goods in that building with the intention in her mind to make it her residence—to make it her home ; and must have gone away on business—temporarily gone away, simply for a temporary purpose ; not permanently ; not with the idea of abandoning the place. If she went away temporarily, to be gone a few weeks or a few days on business of her own, with the intention of coming back and living there, I do not think the policy is vitiated, and I think the plaintiff in this cause, who sues as assignee of the policy, can recover in the case, if you so find.”

The jury, upon this instruction, returned a verdict for the plaintiff, and the defendant assigns error. The only question is whether the instruction of the judge can be supported. We have concluded, after some hesitation, that the instruction should be sustained. There is no doubt that if the insured had actually begun living in the house before her departure on business the temporary absence would not have effected the policy. In contemplation of law her occupation of the house would have been continuous. *Stupetski vs. Transatlantic Fire Ins. Co.*, 43 Mich., 373 ; s. c., 5 N. W. Rep., 401 ; *Cummins vs. Agricultural Ins. Co.*, 67 N. Y., 260 ; *Herrman vs. Merchants' Ins. Co.*, 81 N. Y., 184 ; *Phoenix Ins. Co. vs. Tucker*, 92 Ill., 64 ; *Dennison vs. Phoenix Ins. Co.*, 52 Iowa, 457 ; s. c., 3 N. W. Rep., 500. The only question, then, is whether the fact that for the few days she remained at home before starting on the business trip she did not sleep in the house or take her meals there should make any difference. Under the circumstances we think not. The insured had taken possession of the house, as the jury must have found, for the purposes of permanent occupancy. She had moved in her household furniture and other goods, and was cleaning and doing other work preliminary to living there in person. Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off. Those facts were not conclusive against her occupancy. It could not be justly claimed, we think, that if a family, for the purposes of cleaning and interior decoration, were thus to sleep and take meals at a neighbor's, while busy in the house in working hours, they would in doing so vacate the house. But the case of such a family would be analogous to that of the party insured in this case.

Cases are cited and relied upon on the part of the defense which we think are distinguishable on their facts. *Wustum vs. City Fire Ins. Co.*, 15 Wis., 138, was the case of a policy of insurance which, by its terms, required unoccupied property to be insured as such. The building insured was not occupied, but was not insured as unoccupied, and the policy was held inoperative for that reason. In *Ashworth vs. Builders' etc. Ins. Co.*, 112 Mass., 422, it was decided that merely using a house for the purpose of taking meals in it was not occupancy within the meaning of an insurance policy. "Occupancy," it was said, "implies an actual use of the house as a dwelling place." "The insurer has a right, by the terms of the policy, to the care and supervision which is involved in such an occupancy." This, we think, is true; but, as we have seen, it does not follow that the presence of the occupant in the building should be continuous and uninterrupted. The necessity for temporary absence on business, or for family convenience or pleasure, is recognized, and the insured is understood to contemplate an assent to them.

In *Corrigan vs. Connecticut Fire Ins. Co.*, 122 Mass., 298, the question was whether a tenant who had occupied a house, but had moved with his family out of it and was taking his meals elsewhere, could be said to be occupying it merely because some of his furniture remained in it, and he had surrendered the key. It was very properly held he could not. *Herrman vs. Adriatic Fire Ins. Co.*, 85 N. Y., 162, was still more unlike the present case, and calls for no comment.

It is suggested, on the part of the defense, that the vacating of the house by the tenant of itself put an end to the policy; but there is no force to the suggestion. The policy did not require a continuance of possession by the person then occupying, and Mrs. Norton's possession began when the other terminated, and was for the same purpose, namely, for a dwelling.

The judgment must be affirmed.

(The other justices concurred.)



## SUPREME COURT OF ILLINOIS.

SEPTEMBER TERM, 1884.

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*Appeal from the Appellate Court of the Fourth District.*

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COVENANT MUT. BENEFIT ASS'N

vs.

LAURA HOFFMAN ET AL.

A benefit certificate was payable to wife and children, or in the event of their death to his legal heirs. Suit was instituted in behalf of wife and five children; while pending one child died.

*Held*, That judgment for the whole amount was properly rendered in favor of the wife and four surviving children.

Questions of fraud in procuring the certificate or as to the amount of recovery dependent upon conflicting testimony cannot be reviewed by an appellate court.

Proofs of death are proper to show that the cause of death was not among those excluded by the policy, and it was no error to refuse to instruct that they are not evidence of what disease the insured died, and cannot be considered for that purpose. But it would not have been improper to instruct that the proofs were no evidence as to the special cause of death therein alleged, if so requested.

MCKENZIE & CALKINS, *for Appellant*, Cite : Snell vs. Deland, 43 Ill., 335 ; Murphy vs. Orr, 32 id., 489 ; 1 Chitty Pleading, 20 ; Continental Life Ins. Co. vs. Palmer, 42 Conn., 60 ; Davis vs. Wannamaker, 2 Col., 637.

HAY and KNISPEN, *for Appellees*. Cite : 1 Chitty Pleading, 19 ; Bostwick vs. Williams, 40 Ill., 113 ; Hartford Fire Ins. Co. vs. Davenport, 37 Mich., 609 ; Northup vs. Phillips, 99 Ill., 449.

SCOTT, J.

This suit was brought on a "certificate of membership" in the

Covenant Mutual Benefit Association of Illinois. It was issued to Peter Hoffman, since deceased, in consideration of the sum of ten dollars (membership fee) paid in hand, and of the payment of such amount for mortuary assessments, expenses and collection costs as should be required of him, in accordance with the condition in the certificate expressed. It was provided that upon due notice of the death of the holder of the certificate being filed with the secretary of the association, showing the member had in all respects complied with the conditions of the certificate, an assessment would be levied upon all the members holding certificates in force at the time of the death of such member, for the full amount named in their respective certificates; and the sum so collected on such assessments, less all amounts which might be added for expenses and collection costs, the association agreed by the certificate to pay, or cause to be paid, as a benefit to his wife, Laura Hoffman, and children equally, or in the event of their prior death, to the legal heirs—or devisees of the holder of the certificate, within 90 days from the date of the acceptance of evidence of death; but in no case should the payment under the certificate exceed five thousand dollars. A number of conditions were printed on the back of the certificate which the member was obligated to observe, and it was agreed they should constitute a part of the contract between the parties as if they had been inserted in the body of the certificate itself. So far as any of these conditions are important in the present decision they will be stated further on, but not otherwise. Across the face of the certificate issued to the deceased, was printed in large figures, “\$5,000,” which would seem to indicate that was its value. At his death Peter Hoffman, to whom the certificate was issued, left him surviving his wife Laura Hoffman, and five children, in whose names the suit was brought against the association to recover \$5,000,—the benefit secured to them by the certificate of membership issued to the deceased holder. After the suit was brought, and before trial, Peter Hoffman, Jr., one of the children, died. It appears this child, Peter, was born after the death of the husband, which occurred August 2, 1881, and that he died in May, 1882. His only heirs would be his mother and surviving brothers and sisters. After the death of the child Peter, the suit progressed in the name of the widow and the four surviving children, and judgment was rendered in their favor for the full value of the certificate of membership, which was \$5,000. In no event could any greater sum have been recovered had this youngest child survived.

It is insisted it was error of law to render judgment in favor of the widow and the four surviving children, for the reason the benefit secured was to be paid to the widow and the children equally, of whom the proof shows there were five when this suit was brought. The objection seems to be it was not proper to render judgment for the full value of the benefit, or a declaration in favor of the widow and four children, with the name of the deceased child omitted. It is not perceived there was any error in so rendering the judgment. There are two views, both of which sustain the action of the trial court. First, the benefit was by the certificate, secured to be paid to the widow (by name) and children—that is to Laura Hoffman, and to a class of persons designated as children, and to be ascertained after the death of the holder of the certificate. At the trial it was found, from the proof, there were but four children surviving. They then constituted all the class embraced in the term “children,” and it was entirely correct to render judgment in their favor, as was done. Second, were this not so, the judgment might be sustained for another reason. It is provided by the certificate that in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or devisees of the holder of the certificate. A correct reading of this provision would be: in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here, the plaintiffs were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular and authorized by law.

The point is made the circuit court erred in overruling the motion for a new trial. The argument on this branch of the case might have been with great propriety, and doubtless was, addressed to the appellate court when the cause was heard in that court.

Whether the deceased was guilty of fraud in procuring a renewal of his membership, or whether the evidence warranted a finding for plaintiff, and in the amount found by the verdict, are so exclusively questions of fact, the finding of the appellate court touching them is conclusive upon this court. They are all controverted questions of fact, arising on conflicting testimony, concerning which the statute forbids the assignment of any error in this court.

It is strenuously insisted it was error in the trial court to refuse to give the jury the ninth instruction of the series asked by defendant. It is as follows:—

“The jury are instructed that the proof of death offered in evi-

dence are not evidence of what disease Peter Hoffman may have died, and cannot be considered by the jury for that purpose."

Recurring to the conditions printed on the back of the certificate, it will be seen the benefit was not to become payable if the holder died by reason of any act of self-destruction whatever, whether at the time of committing the same he was sane or insane. The fifth paragraph also contained a number of conditions, the happening of any one of which would render the benefit non-payable. It was no doubt proper, in making proof of the death of the holder, to show he did not come to his death by reason of self-destruction, or by reason of doing any other act mentioned in the conditions, and annexed to the certificate of membership. Stating the disease of which the holder died is a satisfactory mode of excluding the hypothesis he may have died by self-destruction, or that he had been guilty of any other act the doing of which would annul and render void the certificate. The "proofs of death" were proper evidence, although, containing as they did, proof of the disease of which the holder died, and it was not error in the trial court to refuse the instructions in the form it was asked.

The principal controversy at the trial seems to have been whether the application for the renewal of his membership, as made by the deceased, and which it is conceded was a warranty, was false and fraudulent. In the proofs it was stated the disease of which the holder of the certificate died was pneumonia. There does not seem to have been any controversy, he died of some disease of the lungs. The conflict in the evidence is as to whether he had disease of the lungs or other disease at the time he made application for the renewal of his membership. Had the court been asked to instruct the jury the proofs of death were no evidence on that question, no doubt it would have done so. But that was not what the court was asked to do.

The judgment of the appellate court must be affirmed.

Judgment affirmed.

## SUPREME COURT OF ILLINOIS.

*Appeal from the Appellate Court for the First District ; heard in that  
Court on writ of error to the Circuit Court of Cook County.*

DANIEL R. BRANT

vs.

BENJAMIN E. GALLUP ET AL \*

Evidence of an oral agreement as to keeping premises insured is not admissible to vary terms of a mortgage.

Nature of evidence as to amount involved, motives, proof of inducement.

Relevancy of instructions.

A loan agent's opinion expressed as to his duty in keeping mortgaged property insured, will not render him liable.

A party is not entitled to damages for breach of contract in failing to insure where he had notice and might have insured himself. The assumption of such duty by the owner releases the party agreeing to insure. Only nominal damages are recoverable for failure to insure where no harm resulted, and no recovery can be had after five years.

Mr. J. LYLE KING, *for Appellant.*

Messrs. PADDOCK & ALDIS and Mr. EMERY A. STORRS, *for Appellees.*

(*Abstract of Opinion.*)

WALKER, J.

In an action for breach of an agreement to keep insured a building of the insurable value of \$125,000, which was burned, and whereby the owner lost that sum, when the evidence in the record showed the value of the property, it was *held*, that an appeal laid from the final judgment of the appellate court, affirming a judgment for the defendants to this court.

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\* Opinion filed at Ottawa, January 22, 1885. From Chicago Legal News.

In an action to recover damages from the breach of a contract to insure, and keep insured, a theater building during the life of a mortgage, given on the same by the owner, the appellate court affirmed the judgment for the defendants. On application by the plaintiff for an appeal, a motion was made for a certificate of that court, finding the amount involved, and the plaintiff, in support of his motion, filed his affidavit, stating that his claim was for \$125,000 for the breach of the agreement to insure. *Held*, That this court might look to such affidavit as showing the amount in controversy, as well as to other evidence of the value of the property appearing in the record.

Where a party's letters to one, not a party to the suit, are given in evidence against him, to disprove the existence of the contract claimed by him, he may show the circumstances under which they were written, but he cannot testify generally as to his intentions or purpose in writing them, and thereby avoid their effect as a statement or declaration of the facts contained in them.

Although some of the instructions given may be irrelevant to the issues involved, and others may not be precisely accurate, yet if they are not such as to mislead the jury to the injury of the other party, this court will not reverse the judgment.

In an action by the owner of a building burned, against certain loan agents, to recover damages for a breach of a contract on their part to insure the building, his mortgage securing the loan providing he should keep the property insured, the court instructed the jury that any unwritten agreement made at the time of the execution of the mortgage, or just preceding, between the owner and the mortgagee, or the owner and the agents, that the mortgagee would himself keep the property insured, was inconsistent with the clause in the mortgage, and would have been unavailable as a defense to a suit to foreclose the mortgage, and that no benefit could accrue to the owner from such pretended agreement. *Held*, That the matter stated in the instruction, except the last clause, was wholly foreign to every issue in the case, but being a mere abstract proposition, could not have misled the jury.

Where a party asked, and the court gave twenty-five instructions, some of them lengthy, and some in whole or in part repetitions, and others irrelevant and obscure; *Held*, That it would have been proper if the court had reconstructed them, so as to free them from redundancy and verbiage, and all foreign matter, and reduced them to a few clear and perspicuous legal propositions upon which the case

turned. Proper practice would require the court to refuse all but one instruction when they repeat the same proposition.

Where a plaintiff in his declaration alleges the making of a mortgage by him to secure a loan with an insurance clause, as inducement to the making of a contract with the agents of the mortgagee to insure the property, such inducement must be proved as alleged.

Where a party gives a mortgage for a loan, containing a clause requiring him to keep the buildings insured, the assurance of the loan agents to him that such clause required the mortgagee or the loan agents, as the agents of the latter, to effect the insurance for him, will not constitute a contract between the mortgagee and the agents for them to effect the insurance ; and in an action by the mortgagor, after a loss by fire, against the agents to recover for a breach, an alleged contract to insure for the plaintiff, it is not error to instruct the jury that such an agreement is inconsistent with the insurance clause in the mortgage, and constituted no defense to a foreclosure of the mortgage. Such instruction is simply irrelevant.

The expression of an opinion by one of two loan agents effecting a loan on mortgage security, as to the meaning of an insurance clause in the mortgage, as that it required them or their principal, the mortgagee, to effect an insurance, cannot operate to render such agents liable for a failure to insure the property. That can be done only by an agreement to insure, entered into between the parties, understood and intended by them to be binding.

Where a party gives a mortgage to secure a loan in which he covenants to keep the property insured, a verbal contract entered into at the same time with the agents effecting the loan, to keep the property insured for the mortgagor, is not inconsistent with the insurance clause in the mortgage. But an agreement that the mortgagee or his agents will perform the duty imposed by the covenant on the mortgagor, would be inconsistent with the covenant, and not binding. A mere verbal agreement or understanding cannot change or abrogate a party's covenant by deed.

If the evidence fails to establish the contract declared on, the plaintiff cannot recover, and there is no error in so instructing the jury.

A party is not entitled to recover damages for a breach of a contract which he might have prevented, after knowledge of the breach, with time and opportunity to provide against the same. So, if a party has employed another to effect an insurance upon his property, and has notice of the neglect to do so by his agent in ample time

to insure himself, and neglects to do so, he cannot recover for a loss he may sustain for such neglect.

If a party employs another as his agent to procure an insurance upon his property, and the latter directs an insurance agent to issue a policy, and when called on the owner pays the premium, and makes no objection to the amount of the insurance ; and does not order a further insurance for a greater sum, it will be taken that the amount his agent ordered is satisfactory to him, and he cannot recover of his agent for a failure to insure him in a sufficient amount.

Where one employed to procure an insurance on the property of another during the existence of a mortgage thereon, fails to perform his contract for certain years, and the owner assumes that duty himself for those years, he will absolve the other party from his duty under the contract, and waive its performance.

Where a person is employed to insure buildings for another during the time a mortgage had to run, being five years, and neglected to do so for a given year in which no loss occurred, an action lies for the breach, but no more than nominal damages are recoverable, as no actual injury is sustained by such breach.

Where a party agrees with the owner of a lot to keep the buildings thereon insured for five years, and neglects to do so, no recovery can be had for the breach after five years have elapsed.



## UNITED STATES CIRCUIT COURT OF LOUISIANA.

TEUTONIA INS. CO.

vs.

BOYLSTON MUTUAL INS. CO.\*

The plaintiff insured cotton on the steamer *C.*, with privilege of re-shipping from places on the Yazoo River, to tributary of the Mississippi to New Orleans, to the amount of \$3,950; also on the steamer *P.* to the amount of \$1,100. The cotton on the *C.* was all transhipped to the *P.* at Vicksburg, and afterwards the latter took on additional cotton at another point, further insured in plaintiff for \$1,225. Plaintiff had a reinsurance contract with defendant on the excess on its policies on cotton, sugar, molasses and cotton seed, "on the excess of \$10,000 on boats from places on the Mississippi River, but said excess not to exceed \$5,000 by any one boat. On their excess of \$5,000 on boats from places on the tributaries of the Mississippi River, but said excess not to exceed \$15,000 by any one boat."

*Held*, That the terms of the reinsurance contract were descriptive of the boats rather than the freight. Ambiguous language must be construed most strongly against the insurer.

*Held*, That the reinsurer was liable for the excess of \$1,275.

E. M. HUDSON, *for Plaintiff*.

O. B. SANBURN, *for Defendant*.

The facts are sufficiently stated in the syllabus.

PARDEE, J.

The question at issue is one of construction of the written clause in the policy, whether it is descriptive of the boats or of the freight; whether the excess for reinsurance was to be determined by the places the boats were from, or by the places the freight was from. The question is one of great difficulty, and, however decided, the rule adopted would lead to contingencies evidently not contemplated by the parties. From the language of the clause in question, it is clear that the defendant limited its risk to \$15,000 on any one boat; that the policy was intended to protect plaintiff's risk above \$10,000 on any one boat on the Mississippi River, and above \$5,000 on any one boat on the tributaries of the Mississippi; and this is

\* Decision rendered April 10, 1884.

conceded by the learned counsel for defendant. Now, suppose the case of a boat running between New Orleans and Memphis. At Memphis she takes on \$10,000 freight which is insured by plaintiff. At the mouth of the Yazoo she takes on \$5,000 more freight, shipped from Yazoo City with privilege of re-shipment, and also insured by plaintiff. The plaintiff has then \$15,000 risk on one boat running on the Mississippi. The contract in question was intended to reinsure all in excess of \$10,000. To accomplish this intent of the parties the clause in question must be construed as descriptive of the boats carrying the freight, and not of the freight, for if we construe it as descriptive of freight, then the plaintiff has a risk of over \$10,000 on one boat on the Mississippi and no reinsurance, because only \$10,000 is from places on the Mississippi, and only \$5,000 is from places on the tributaries of the Mississippi, and this is in conflict with the conceded intent of the parties. On the other hand, if we construe the contract as descriptive of the boats, then we have a case where the risk is determined, not by the route over which the goods are to be transported, which is the ordinary consideration, but by the fact as to where the boat had made her voyage before the risk was assumed.

The contention of the defendant with regard to the proper construction, as most clearly and concisely stated by the counsel, is that the words "on boats from places on the tributaries of the Mississippi River" must be construed with reference to the principal purpose of the contract, which is the insurance on cotton, etc., from points and places on the Mississippi River and its tributaries to New Orleans. There is no doubt the details of the contract should be construed with reference to the main purpose of the contract, but this concession does not relieve us of the difficulty in this case. Of course, the purpose of the contract is the insurance of cotton, etc., in transit, and to reach it intelligently four things have to be provided for: (1) The territorial limit of the proposed risk ; (2) the character and kind of property to be risked ; (3) the character and kind of transportation to be employed, and (4) the amount of risk to be assumed. These things are provided for in this policy in order, to wit, from points and places on the Mississippi River and its tributaries, on cotton, sugar, molasses and cotton seed, transported on boats from places on the Mississippi River, and on boats from places on the tributaries of the Mississippi River, and in the one case on the excess of the \$10,000, and in the other on the excess of \$5,000. The construction claimed by the defendant would ignore all differ-

ences between the character and kind of boats plying on the Mississippi River and of the boats plying on the tributaries, while the contract makes the two classes and provides different responsibilities for each class. The construction claimed would be the plain letter of the clause in controversy, if we should strike out where they occur the words "on boats," for it would read in this case "on their excess of \$5,000 from places on the tributaries of the Mississippi River." The rules of construction will not allow us to strike out these words, but do require us to give meaning and force to them if possible. If we take the words of the contract as the parties have left them, and in the connection that they have used them, it would seem to be more in consonance with the real intent of the parties and with the rules of construction of such contracts, to construe them as descriptive of boats rather than as descriptive of freight.

Ambiguous language in an insurance policy should be construed against the insurer. See *May, Ins.*, §§ 174-176, and *Wood, Ins.*, 140, et seq. This construction is in accord with the only adjudged case cited in argument. See *Phoenix Ins. Co. vs. Cochran*, 51 Pa. St., 143. The insurance in that case was on two policies of same date for \$5,000, each for one year, on oil in bulk or barrels, on board the good barges trading as to one policy, between the wells on Oil Creek, Allegheny River, and Pittsburgh, as to the other between Oil City and Pittsburgh; the wells on Oil Creek are above Oil City, which is at the mouth of Oil Creek; and the court held that these points were descriptive of the barges and not the freight, and that whenever the oil was taken on or delivered between these points it was within the policies if the barges were trading between these points. This construction is also in accord with what, from well-known facts, would seem to be the motive of the parties in discriminating as to the amount of reinsurance against the tributaries and in favor of the Mississippi, because it is well known that in quality of boats and in dangers of navigation the difference is largely in favor of the Mississippi. In deference to the very clear, earnest and forcible manner in which counsel for defendant has presented his case, I have most carefully considered the question presented, and while I am not free from doubt, I cannot avoid the conclusion that the clause in the policy in suit is descriptive of the boats and not entirely of the freight. Reaching this conclusion, under the agreed state of facts, judgment must go for the plaintiff for \$1,275 and costs; and it is so ordered.

## SUPREME COURT OF VERMONT.

FEBRUARY TERM, 1884.

A. P. CHILDS.

vs.

MILLVILLE MUT. M. &amp; F. INS. CO.\*

The supreme court will not reverse or revise a former decision in the same cause, with the same facts

The plaintiff and defendant having had a controversy as to what was due the former, he wrote to the latter to send him "such an amount as you feel inclined, which shall be accepted in full satisfaction of my claims." The defendant sent in response \$268.31, which was retained by the plaintiff.

*Held*, That it was an accord and satisfaction.

The plaintiff was an insurance agent for the defendant company. A fire loss having occurred on one of the policies which he had issued, he adjusted and paid it, without any obligation to do so, and without any knowledge or authority or ratification of the defendant. Afterwards, on receipt of what he had paid, the plaintiff surrendered the policy duly receipted to the company, claiming no interest. *Held*, A full discharge of interest.

*Assumpsit*. Plea, the general issue. Trial by jury, December term, 1883, Veazey, J., presiding. Verdict ordered for the defendant.

BATCHELDER & BATES, for the Plaintiff.

There was not an accord and satisfaction. Preston vs. Grant, 34 Vt., 203 ; Blair vs. Ward, 69 N. Y., 115 ; Bolton vs. Hillersden, 1 Ld. Raym., 224 ; Her. Est., 341, 346 ; Bliss vs. Stewart, 65 N. Y., 444 ; Jewett vs. Miller, 10 N. Y., 403 ; Brown vs. Bowen, 30 N. Y., 514 ; Payne vs. Burnham, 62 N. Y., 69. The plaintiff was entitled to the interest. Spencer vs. Williams, 2 Vt., 209 ; Seely vs.

\* From Advance Sheets of 55 Vt. Rep.

Spencer, 5 Vt., 334 ; Wright vs. Allen, 4 Vt., 572 ; Shaw vs. Clark, 6 Vt., 507 ; Wheeler vs. Wheeler, 11 Vt., 60 ; McDaniels vs. Lap-  
ham, 31 Vt., 222 ; Goodwin vs. Follett, 25 Vt., 386 ; Willey vs.  
Warden, 27 Vt., 655.

*CAHOON & HOFFMAN, for the Defendant.*

Every question in this case was passed upon by the court at the general term, 1882. The court will not revise its former decisions, with the same facts. Stacy vs. Vt. Cen. R. R. Co., 32 Vt., 551 ; Baker vs. Belknap, 39 Vt., 168 ; Rob. Dig., p. 350 ; Herrick vs. Belknap, 27 Vt., 673 ; Ross vs. Bank, 1 Aik., 43 ; Dana vs. Nelson, 1 Aik., 253. The receipt of the money and the surrender of the policy constitute a full discharge of interest. Ellsworth vs. Fogg, 35 Vt., 355 ; Draper vs. Hitt, 439 ; Rob. Dig., p. 523.

*TAFT, J.*

This case shows that a controversy arose as to a claim of the plaintiff, for money paid upon the cancellation of policies in the defendant company. The parties disagreed as to the amount due the plaintiff. The plaintiff wrote the defendant to send him "such an amount as you feel inclined, which shall be accepted in full satisfaction of my claims for returned premiums against your company." The defendants sent in response the sum of \$268.31, and this sum was retained by the plaintiff. This claim is precisely the one made at the former trial in this cause at the December term, 1881. Exceptions taken at that trial were heard at the general term of this court in 1882. It was then held that the correspondence disclosed an accord and satisfaction. The facts shown upon this trial were precisely those contained in the former bill of exceptions. This court will not reverse or revise a former decision in the same cause. Stacy vs. Vt. Cen. R. R. Co., 32 Vt., 551 ; Sturges vs. Knapp, 36 Vt., 439. The plaintiff at the trial below presented a claim that he did not make upon the former trial. In the year 1880, he paid a loss under a policy issued by the defendant ; the loss had been properly adjusted at the sum of \$1,831. The plaintiff had no authority from the defendant to make the payment ; he was under no obligation to make it ; it was made without the knowledge or consent of the defendant. The defendant when informed of the payment made no objection thereto. The money was not paid at the defendant's request, express or implied ; and there was no subsequent ratification of the payment. The most favorable construction that the

plaintiff could ask to have put upon his acts, is to be held the equitable assignee of the claim evidenced by the policy and the adjustment of the loss under it. He could not, by simply paying the claim, make the defendant his debtor against its will. The plaintiff so being the owner of the policy and the claim under it, surrendered it to the defendant, duly receipted, receiving the amount he paid, and claiming no interest. He now insists upon a recovery of the interest from the time he paid the claim until the account was paid him by the defendant. Admitting that he was entitled to interest, we think the case within the principle laid down in *Ellsworth vs. Fogg*, 35 Vt., 355 ; and *Draper vs. Hitt*, 43 Vt., 439. The receipt of the money and surrender of the policy should be held a full discharge of the claim.

Judgment affirmed.

## SUPREME COURT OF KANSAS.

STATE OF KANSAS, *EX REL.*,  
vs.  
VIGILANT INS. CO.

A contract by which one party promises to make a certain payment upon the loss or destruction of something which the other party owns or has an interest in, is a contract of insurance.

That the promisor is a corporation; that its promise is only to those who become members of the corporation, and that it has no accumulated funds out of which to make good its promise, but relies therefor exclusively upon assessments made upon its members, do not change the character of the contract.

The State has the right to say who may engage in the business of insurance, and upon what terms, and may proceed by civil action in quo warranto against any corporation created under the laws of the State, which, without authority, assumes to carry on the business of insurance.

BREWER, J.

This is an original action in quo warranto, brought in this court in the name of the State, on the relation of the attorney-general, charging that the defendants are unlawfully carrying on the business of insurance in this State. It alleges that the individual defendants are assuming to act as the officers of their co-defendant, "The Vigilant Insurance Company."

The defendants have appeared and answered, and the case has been submitted to us upon an agreed statement of facts. It is admitted that the Vigilant Insurance Company has been incorporated under the laws of the State; that the individual defendants are its officers; and that they are transacting business within the limits of the State. It is also agreed that they have not complied, or attempted to comply, with the requirements of the insurance law of

the State. (Compiled Laws, 1879, chapter 50a.) Indeed, the contention of the defendants is, that the business which they are carrying on is not strictly an insurance business, and that therefore they are not within the purview or subject to the requirements of that statute. So that the only question for our determination is, whether the business which defendants are carrying on is the business of insurance, and covered by the provisions of that statute. It is also agreed that the character of the business which defendants are carrying on is disclosed by the cards, circulars and prospectuses issued by the Vigilant Insurance Company, and made a part of the agreed statement.

The name of the corporation is the Vigilant Insurance Company. The name, of course, may not be conclusive, but it indicates the thought and intent of the incorporators. The purposes of the incorporation, as disclosed by the charter, are as follows: "That the purposes for which this corporation is formed is to afford mutual indemnity and protection to its members, viz.: indemnity in case of loss by accidents, death, and theft of horses, mules, jacks and jennies used for private purposes only, said indemnity being secured by the collections and disbursements of assessments pro rata, the expenses of doing business between the members to be met by admission fees and semi-annual dues. The organization being in one sense a detective association for the protection of its own members against horse thieves." And if we examine the cards, circulars, etc., we find this: The corporation proposes to "indemnify its members for loss or damage by accidents, death, and theft, of animals belonging to members." It says, it is true, in one of its circulars, that it does not sell insurance and does not receive premiums for insurance, but nevertheless its single unmistakable business is that of contracting for indemnity for loss. Its method is this: Each member pays a membership fee and annual dues. This is for the purpose of keeping up the organization, paying officers' salaries, etc. Then for losses, assessments are made upon the members; and only members can share in the benefits of the corporation. There is no accumulated fund out of which to pay losses, but reliance is wholly upon the assessments. But this is insurance: it is contracting for indemnity. It matters not how the funds for the payment of losses are secured. So long as the contract is such that in case of loss the promisee is entitled to claim compensation for the loss, it is a contract of indemnity. In the case of *Commissioner vs. Wetherbee*, 105 Mass., 149, the supreme court of that State thus defines insurance:—



"A contract by which one party promises to make a certain payment upon the destruction or injury of something in which the other party has an interest, is a contract for insurance, whatever may be the terms of payment of the consideration, or the mode of estimating or securing payment of the sum to be insured in case of loss."

Burrill, in his *Law Dictionary*, volume 2, page 87, gives this definition: "A contract whereby, for a stipulated consideration, one party undertakes to indemnify the other against certain risks." And so run the text-books and authorities generally. *State vs. Bankers' Association*, 23 Kas., 499; *Bolton vs. Bolton*, 73 Me., 299. Tested by these authorities, there can be no question but that the contracts of the Vigilant Insurance Company are contracts for insurance. It is a co-operative insurance company, organized substantially upon the same basis as many life companies. Being such, it is covered by the insurance law.

As to life insurance companies organized on the co-operative plan, they are expressly exempted from the provisions of that act. *Laws 1871*, page 284, sec. 78; *State vs. Bankers' Association*, *supra*. As to all other insurance companies, they are within its terms. *Compiled laws of 1879*, chapter 50, secs. 23, 25 and 31.

Of course, attempting to carry on the business of insurance in defiance of the laws of the State, the defendants are liable to this action. *Code Civil Procedure*, sec. 653, paragraph 4. Of the power of the State to control matters of this kind there can be no doubt, and whether the policy it pursues be wise or not, is a matter the courts may not inquire into.

Judgment will be entered in behalf of the State, as prayed for.

## LOWER COURT DECISIONS.

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### BURDEN OF PROOF IN CASE OF ALLEGED SUICIDE.

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*Court of Appeals for the Parish of Orleans, Louisiana.*

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MRS. ANNA BOIS.

*vs.*

MASSACHUSETTS MUTUAL LIFE INS. CO.

Where the person whose life is insured has occasioned the discharge of the pistol which killed him, the burden of proof is on the beneficiary to show that the discharge of the pistol was accidental. The same presumption, that men contemplate the natural consequences of their acts, applies to policies of insurance as well as to civil and criminal matters.

BRAUGHN, BUCK & DINKLESPIEL, *for Plaintiffs.*

MERRICK, FOSTER & MERRICK, *for Defendant.*

In this case, an attempt was made to show that the deceased was cheerful in the morning when he went into the parlor where the discharge of his pistol was heard, and that the day was pleasant, and that he spoke cheerfully with neighbors, etc.

McGLOIN, J.

This is a suit upon a policy of life insurance. The policy contained, among other clauses, one which rendered it void in case the party insured should "die by his or her own hand, whether sane or insane." The judgment below was in favor of the defendant company. The argument on both sides has been elaborate and able, and cover-

ing many points. We, however, have not considered it necessary to pass upon any question except the one whether the party insured has committed suicide, or whether his death was the result of an accident.

It seems now well settled that, under a clause such as the one referred to as being contained in this policy, the contract is avoided, if the deceased has killed himself, even if though drawn by insanity to the performance of the deed. *Bigelow vs. Berkshire Life Ins. Co.*, 93 U. S., 284; *Pierce vs. Travelers Life Ins. Co.*, 34 Wis., 389; *De Gorgoza vs. Knickerbocker Life Ins. Co.*, 65 N. Y., 237; *Chapman vs. Republic Life Ins. Co.*, 6 Bissel, 238.

Nor have we been satisfied from the evidence that, at the time when death came upon the insured in this case, he was laboring under the effects of insanity. In fact, we have not understood appellant as contending in any particular manner for the theory of insanity, but rather her contention has been that the death was accidental, or, at all events, that proof has not been adduced sufficient to show that it was intentional.

Whatever be the law with regard to the burden of proof upon an issue such as this, one thing is certain, and that is, that the fact of intentional self-murder is not beyond the pale of all proof. Neither are we aware of any law or precedent which excludes such issue from the domain of circumstantial evidence. Indeed, it would be strange to find in a controversy such as this a higher and more difficult character of evidence demanded than has been considered sufficient from time immemorial, in cases where persons accused of capital offenses are on trial for their lives.

It is proven in this case that the insured, being in the parlor of his house alone, and at about two o'clock in the day, came to his death as the result of a pistol-shot wound; that said wound was in the mouth, the ball having entered "the upper portion and went through (the) hard palate." Now, for a ball to have thus entered into the upper portion thereof into the hard palate, which is behind the lip, and gum and teeth, it is evident that the following actions must have been performed:—

1st. That the deceased should have opened wide his mouth.

2d. That he should have placed the muzzle of the pistol within the mouth, or at least have pointed it towards the roof of his mouth thus opened wide.

3d. That with mouth thus opened, and pistol thus pointed, he had discharged the weapon.

Now, had respectable parties been eye-witnesses to these circumstances and sworn to them in this case, what could the court a quo, or this court, do but pronounce the act one of self-killing?

It is indeed possible that a man might have thus opened his mouth, and thrust therein a cocked pistol, not intending actually or contemplating the discharge which followed; but the probabilities are all the other way, and so it would be just as reasonable to ask for the acquittal of a man on the plea of accidental homicide who had thrust a loaded and cocked pistol into the face of another and fired, producing death, as it would be in this case for the court to over-ride the probabilities, and decide the same upon the very weakest of possibilities.

We have supposed the facts established by the testimony of eye-witnesses; but the nature and location of the wound in this case speaks for itself more positively even than the words of spectators could do; for it would be a miracle to produce that wound except under the circumstances already detailed.

We have examined the case of *Philips vs. Louisiana Equitable Life Ins. Co.*, 26 La. Ann. 404; and we do not find ourselves precluded thereby from rendering the decree in this case which our consciences and judgments declare should be entered. In this instance, the shooting was done in the light of day, and no secret assassin has been suspected, or can be imagined with any showing of reason. In that case the opinion does not declare that the fatal ball entered the upper portion of the mouth—the hard palate—as is shown in this, and necessitating the wide opening of the mouth. Indeed, it would be quite an impossible effort on our part to convince ourselves that a man could possibly sleep with mouth so extended as to permit a ball to enter therein and pierce the very roof, as occurred in this case. The judge a quo found for the defendants, and we consider his ruling correct.

It is therefore ordered, adjudged, and decreed that the judgment appealed from as amended or affected by the consent filed March 9th, 1884, authorizing plaintiff to receive the sum deposited by defendant in the lower court, be affirmed, and plaintiff pay the costs of this appeal."

HENRY B. KELLY, J., concurring.

The character of the wound which caused the death of the party insured, and its location in the upper part of the interior of

the mouth as shown by the testimony, appear to my mind to be consistent with no other hypothesis than that the insured died by his own hand, and not accidentally, but designedly. I concur generally in the views expressed by my learned associate, and in the opinion that the judgment appealed from should be affirmed.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### DIVIDENDS.

§ 60. *LIFE.—Circular as Evidence.—Controlled by Charter.*—  
A circular of the company, referring to dividends as having been  
declared, when in fact there was no evidence or other claim that  
such was actually the case in respect to this policy, it was not  
evidence of such dividends in the case of this policy. Where  
dividends, under the charter and by-laws were regulated by the  
directors, the policy was only entitled to such dividends as had  
been declared on it.

*Continental Life Ins. Co. vs. Hamilton.*

Rep'd Jour'l, p.

3 S. O.

## EVIDENCE.

§ 61. *LIFE—Effect of Demurrer.—Harmless Error.*—The effect of a demurrer against the evidence is to concede as true all facts against which there is any evidence, and to exclude the evidence of the party demurring, and if on such evidence a jury might rightfully find against the party demurring, the demurrer should be overruled. A court may look beyond the demurrer to the evidence and inquire into defects in the declaration. A party demurring to evidence is not precluded from afterwards presenting on appeal questions properly reserved, arising on the pleadings.

Walcott vs. Ins. Co., 81 Ind., 301; Radcliff vs. Radford, 96 Ind., 482; Ruddell vs. Tyner, 87 Ind., 529; Adams' Assignee vs. State, 87 Ind., 573; Fritz vs. Clark, 80 Ind., 591; Hagenbuck et al. vs. McCloskey, 31 Ind., 577; Nordyke and Marmon Co. vs. Van Sant, 4 Ind. Law Mag., 165; Trimble et al. vs. Pollock, 77 Ind., 576; Ruff et al. vs. Ruff, 85 Ind., 431; Ohio etc. R. W. Co. vs. Collam, 73 Ind., 261; Indianapolis etc. R. R. Co. vs. McLin, 82 Ind., 435; Miller, Trustee, vs. Porter, 71 Ind., 521; Lindley vs. Kelly, 42 Ind., 294; Kansas Pacific R. W. Co. vs. Couse, 17 Kan., 571; Wright, Ad'mr., vs. Julian, et al., 4 Ind. Law Mag., 35; L. S. & M. S. R. W. Co. vs. Foster, 3 Ind. Law Mag., 196.

A harmless error cannot be complained of on appeal.

Johnson vs. Ramsay, 91 Ind., 89; Busk, Pr., 284; 1 Work's Pr., sec. 528; McComas vs. Haas, 93 Ind., 276; The State etc. vs. Julian, 93 Ind., 292, and the cases there cited. Bartlette vs. Pittsburgh etc. R. W. Co., 94 Ind., 281; Louisville etc. R. W. Co. vs. Davis, 94 Ind., 601.

*McLem vs. Equitable Life Ass's Society.*

Rep'd Jour'l, p. 269.

IND. S. O.

## FRAUD.

§ 62. *LIFE.—Compromise of Claim by Agent is Vitiating by.*—The agent represented to the executor claiming the proceeds of a life policy, that it was worthless; that he had obtained sufficient evidence to defeat the claim, and finally induced the executor, who was in great distress and financial trouble at the time, to compromise the claim. *Held*, That where such a compromise was secured by false and fraudulent representations to an old man whose faculties were impaired by trouble, the balance of

the claim may be recovered, the settlement was vitiated by the fraud.

*McLean vs. Equitable Life Ass'e Society.*

—§ 61.

## LIMITATION.

§ 63. FIRE.—*In case of Liability to Assessment in Mutual Company.*—It is an established rule that the statute of limitations is no bar to an action brought within six years of the date when the claim became suable. Where the liability of the member of a mutual insurance company is to pay, after assessment and notice, his proportion of losses and expenses occurring during his membership, the right of action against him does not accrue till after assessment and notice. If suit be brought within six years after the assessment and notice, though more than six years after termination of the membership, the statute will not bar.

Scovil vs. Thayer, 105 U. S., 143; Howland vs. Cuykendall, 40 Barb. 320; Slater vs. Mutual Fire Ins. Co., 10 Rhode Island, 42; Bigelow et al. vs. Libby, 117 Mass., 359; Hope Mutual Life Ins. Co. vs. Weed, 28 Conn., 51; Girard Bank vs. Bank, 39 Pa. St., 92; Finkborne's Appeal, 86 Pa. St., 368. Distinguishing and excepting to Laforge vs. Jayne, 9 Pa. St., 412; Pittsburgh & Connellsville Railroad Co. vs. Beyers, 32 id., 22; Morrison's Adm'r vs. Mullen, 34 id., 12; and Codman vs. Rogers, 10 Pick., 112.

*Smith vs. Mercer Co. Mut. F. Ins. Co.*

Rep'd Jour'l, p. 302.

PA. S. C.

## MUTUAL COMPANIES.

§ 64. FIRE.—*Construction of Ohio Statute as to Organization and Assessments.*—Ohio Revised Statutes, sections 3,686, 3,687, 3,688, 3,689, 3,690, authorize the formation of corporations to insure its members against loss by fire or other casualties, and empowers them to make and enforce among their members contracts of indemnity, by which those entering therein shall agree to be assessed specifically from time to time, as may be necessary to pay losses which occur to its members, and also to pay



incidental expenses in the management of the business. Such members are liable to be specifically assessed, from time to time, to pay losses which occur while they are such, but no member is liable to such assessment to pay losses occurring before he became a member, or which may occur after he ceases to be a member. These sections do not authorize a contract with members, by which they, upon advance payment of an agreed annual deposit during the life of their policy, shall be exempted from liability to assessment to pay losses occurring during the year for which such prepayment was made ; or by which a member's liability to assessment is limited, without regard to the amount that may be necessary to pay losses to fellow-members that may occur during such year. These sections do not authorize the organization of corporations with a view to profit to its officers or members ; therefore any plan or scheme by which profits are made or divided is unauthorized. Section 3,680 authorizes the adoption by the corporation, of a constitution and by-laws regulating the assessment and collection of such sums of money as may be necessary to pay losses as they occur, and for incidental purposes ; but it does not authorize a regulation by which a policy may be declared forfeited for the non-payment in advance of an annual deposit or premium, whether an assessment during such year to pay losses may be necessary or not. Such an annual deposit paid in advance, based upon the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year is in fact a premium paid for carrying the risk, and not a specific assessment authorized by the statute. The funds derived from assessments upon members to pay losses to fellow-members, are in their nature trust funds to be applied to the payment of such losses ; hence the application of such funds, or of the annual deposits received in lieu of assessments, to the purchaser of the assets of another like corporation, including real estate not necessary to its business, or to the payment of losses to members of such other corporation whose risks it has assumed, is a misapplication of such funds.

*State vs. Monitor Fire Association.*

## PAROL CONTRACT.

§ 65. FIRE.—*Effect of Preliminary Contract.—When Complete.—Equitable Remedies.—Where Agents Represent Other Companies than those Mentioned.*—An agreement to pay the premium at the rate specified is a sufficient consideration to make the agreement a binding contract. Generally, whatever is agreed to be done is considered in equity as done. The agreement to insure may be considered in equity as insurance. When a contract is made out in any mode to be a preliminary contract of insurance, instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in such case cannot be denied.

Rev. St., § 723 ; *Taylor vs. Merchants' Ins. Co.*, 9 How., 390 ; *Commercial Ins. Co. vs. Union Ins. Co.*, 19 How., 321.

If the agents of five insurance companies make an agreement with a party to insure her premises in four of their companies, naming them, such party has not, after destruction of her premises by fire, and before any policies are delivered to her, a claim against the fifth company for the loss, even though each of the five companies had written out policies for her. If the agents of five insurance companies make an agreement with a party to insure her premises in four of those companies, naming them, such party has, after destruction of her premises by fire, a claim against the four companies named for the loss, even though there have, as yet, no policies been delivered to her, and such companies are proper parties in a suit to recover the loss.

*Fitton et ux. vs. Fire Ass'n.*

Rep'd Jour'l, p. 254.

Vt. U. S. C. C.

## PLEADING.

§ 66. LIFE.—*Filing Application and Medical Examination.*—The defendant company cannot be compelled to file the application and medical examination in the office of the clerk of court.

*Mealy vs. Metropolitan Life Ins. Co.*

Rep'd Jour'l, p. 306.

R. I. U. S. C. C.

## PROHIBITED RISK.

§ 67. FIRE.—*Fireworks not Gunpowder.*—The keeping of fireworks without the written consent of the insurer will not invalidate a policy of fire insurance, although the same provides that if gunpowder is kept on the premises without such written consent, the policy shall be void.

*Fishler vs. Col. Farmers' Ins. Co.*

Decision rendered, Nov. 28, 1884.

CAL. S. C.

## REFORMATION.

§ 68. FIRE.—*Mistake must be Mutual.*—In a suit to reform a written instrument, it must be shown that the mistake is mutual; and therefore it must appear from the allegations of the bill, what the agreement of the parties was, and wherein the writing fails to embody it. A bill brought to reform a policy of insurance, stated that the several owners of a certain warehouse, applied to the defendant for insurance against fire on their interests in said property, with loss, if any, payable to one of them; and that "thereupon" the defendant issued its policy on the interest of that one alone, instead of all: *Held*, On demurrer to the bill for want of equity, that it did not appear that the defendant ever agreed to insure the interest of but one of the owners, and therefore it was not shown that the mistake was mutual.

*Hearne vs. Marine Ins. Co.*, 20 Wall., 490; *Brugger vs. State Invest. Co.*, 5 Saw., 310; *Wood on Ins.*, 505; 1 Wash. R. P., 422; 2 id., 565, 568; *Friedman vs. Goodwin*, 1 McA., 149.

*Durham vs. Fire & Marine Ins. Co.*

Rep'd Jour'l, p. 285.

OREGON U. S. C. C.

## REPRESENTATION.

§ 69. LIFE.—*As to Age in Case of Domestic Companies in Ohio.—Construction of Statute.*—The Ohio statutes deprive foreign companies of the right to set up untrue statements as to age, but leave Ohio companies in full possession of such right.

*Lowe vs. Union Central Life Ins. Co.*

Rep'd Jour'l, p. 294.

O. S. C. C.

## SUICIDE.

§ 70. *LIFE.—Construction of Policy.—Right to Stipulate for Reserved Sum.*—Any clause in a policy of life insurance should be construed somewhat strictly, but parties may stipulate what risks shall be covered by the policy, and if the terms are not ambiguous they will be enforced. There is nothing in the laws of Michigan which forbids a life insurance company paying (under the terms of its policies) the beneficiary of a policyholder who has taken his own life, a "reserved sum," which virtually refunds the premiums paid instead of the amount of the policy. The fact that the policy does not declare what the reserved sum shall be, does not render the clause referring to it void, provided it is ascertainable.

*Frey vs. Germania Life Ins. Co.*

Rep'd Jour'l, p. 308.

MICH. S. C.

## TITLE.

§ 71. *LIFE.—In Case of Benevolent Policy.—Construction of Charter.*—A took out a policy in a benevolent insurance company, in which he designated his brother as the beneficiary. The brother died before A. The charter provided: "Upon the decease of any member of this association, the fund to which his family is entitled, shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go, First—to the widow and infant children. Second—to his mother and sisters. Third—to his father and brothers. Fourth—to his grandchildren. Fifth—to his legal heirs. The fund due deceased members shall not be subject to the claims of creditors, and shall not be reached by attachment, garnishment, or other process of law, so as to divert from the family of such members." *Held*, That upon A's death, the proceeds of the policy were not payable to the brother's personal representative or distributees, but to the widow of A. The designation had been changed by death.

*Van Bibber's Admr. vs. Van Bibber.*

Rep'd Jour'l, p. 290.

KY. C. A.

## TITLE.

§ 72. FIRE.—*Of Husband in Property of Wife.—Right of Husband to Insure.—Right of Action.—Garnishment by Creditor.*—Insurance taken out by a husband in his own name upon sole and separate property of his wife, is to be presumed to have been procured by him as her agent and for her benefit. Where a company's policies provide that "any interest in property insured not absolute, or that is less than a perfect title, must be especially represented to the company and expressed in this policy in writing, otherwise the insurance shall be void," it is the duty of the agent who makes the contract in behalf of the company, if he knows that the property upon which insurance is desired belongs to the applicant's wife, to state that fact in the policy, and if he fails to do so, the policy will not be invalid on that account. A husband who has taken out insurance as his wife's agent upon her property in his own name may sue in his own name for her benefit in case of loss. Where a husband insured property in his own name, part of which belonged to him and part to his wife, and after a loss a creditor of his obtained judgment against him and garnished the insurance company and obtained judgment for the amount of the husband's loss, *held*, That the judgment in the garnishment proceedings did not estop the husband from suing the company in his own name for the amount due his wife.

*Hunt vs. Mercantile Ins. Co.*

Rep'd Jour'l, p. 298.

Mo. U. S. C. C.

§ 73. FIRE.—*To Property purchased by Another with Funds of Insured.—Construction of Policy.—Usage.—Authority of Agent to Waive Forfeiture.*—Suit on insurance policy issued on goods, wares, merchandise, produce and other property owned or held in trust or on commission, or sold and not delivered, by the insured, at certain designated places. The property destroyed was cotton purchased by K. with funds belonging to the insured, under an agreement that when K. sold the cotton he was to pay the insured the money, and if shipped, the bills of lading were to be taken in the insured's name or assigned to it. The cotton

was not in any place designated by the policy. *Held*, A demurrer was correctly sustained to the petition setting up these facts, as it furnished no good cause of action. The title was in K. and not in the insured. An insurance policy must be construed according to its terms and the evident intent of the parties to be gathered from the language used. The court cannot extend the risk beyond that fairly within the terms of the policy.

Wood on Ins. p. 157. Home Ins. Co. vs. Warehouse Co., 3 Otto 527.

Custom or course of dealing between parties, like other extraneous facts or circumstances, may sometimes be looked to in order to interpret what is doubtful, but not to contradict that which is plain. Although a custom or usage be inconsistent with the printed conditions of the policy, it may nevertheless be shown, not to alter or vary the contract, but to show that such conditions were waived.

Wood on Ins., 848, 849.

The agent of an insurance company, keeping within the limits of his authority, may, by his acts, and sometimes by his failure to act when he should do so, dispense with conditions or waive forfeitures, and thus bind the company. But such cannot be done in cases like this, where the power of the agent is defined and limited in the policy of which the insured must take notice.

Crescent Ins. Co. vs. Griffin, Tex. S. C.

First Nat. Bank vs. Lancashire Ins. Co.

Rep'd Jour'l, p. 278.

TEXAS, S. C.

#### WIFE'S POLICY.

§ 74. LIFE.—*Right of Husband to Surrender*.—Where a wife is in the habit of leaving all business affairs to her husband, and he, without her knowledge, insures his life for her benefit, and keeps possession of the policy, and pays all premiums himself until the policy is fully paid up, without action or interference on her part, and, after the policy is paid up, the insurance company becomes financially embarrassed, he has implied au-

thority to bind her, by an agreement in her name, to a reduction of the amount of the insurance.

*Singer vs. Charter Oak Life Ins. Co.*

Decision rendered, June 5, 1882.

Mo. U. S. C. C.

#### WIFE'S POLICY.

§ 75. LIFE.—*Right to Surrender.*—*Title of Husband.*—Where the wife being the beneficiary in a wife's policy, had died, and the policy stipulated for surrender after the payment of two premiums, her administrator was not entitled to such surrender until two premiums had been paid. Where the husband had been treated for eight years as the beneficiary by the company, the latter was estopped from denying it.

*Continental Life Ins. Co. vs. Hamilton.*

— §60.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

## SUPREME COURT OF OHIO.

*Error to the District Court of Delaware County.*

CONTINENTAL LIFE INS. CO., OF HARTFORD, CONN.,  
vs.  
HAMILTON.

Where the wife, being the beneficiary in a wife's policy, had died, and the policy stipulated for surrender after the payment of two premiums, her administrator was not entitled to such surrender until two premiums had been paid.

Where the husband had been treated for eight years as the beneficiary by the company, the latter was estopped from denying it.

A circular of the company referring to dividends as having been declared, when in fact there was no evidence or other claim that such was actually the case in respect to this policy, it was not evidence of such dividends in the case of this policy.

Where dividends under the charter and by-laws were regulated by the directors, the policy was only entitled to such dividends as had been declared on it.

BY THE COURT.

On August 11, 1866, defendant issued to C., a married woman, a policy for \$5,000 on the life of A., her husband. It was for her



benefit, and payable to her, "her executors, administrators or assigns." In case of her death before that of A., the insurance was payable to their children for their use, or to their guardian if under age." Upon a surrender of the policy, after two annual premiums had been paid, she would be entitled to a paid-up policy for two-twentieths of the sum originally insured. C. died intestate in October, 1866, leaving no children. A. survived her, and paid the annual premiums until 1875, when he offered to surrender the policy and demanded a paid-up policy. This was refused, and he sued the company in his own name. One-half of each premium had been paid in cash and for the other half promissory notes payable twelve months after date were given. Five of these were still owned and held by the company. For the payment of these notes the policy was pledged. The policy was of the kind entitled to dividend credits. Five dividends had been credited by the company on the last five premiums. A. claimed dividends for the first four years of the policy, but did not aver that there had been any omission by the company to declare any dividend to which the policy was entitled.

The only evidence supporting his claim was a circular of the company's secretary, dated December 15, 1873, and mailed to one E., who had no connection with C. or A. It contained the following paragraph:—

"The reason of the above action is, that the experience of this company, and the experience of other companies, older, carefully managed, and successful, has demonstrated the impracticability of sustaining a yearly dividend of fifty per cent upon life, and forty per cent upon endowment policies, such as this company has sustained during the past six years, and which it is the last of all the companies to abandon.

"Aside from the impracticability of continuing the dividend at this rate, the system of large dividends deferred in payment for several years, coupled with a system of credits or notes in payment of premiums, has proved cumbersome and expensive, defeating thereby the very object intended, viz.: the reduction of the cost of insurance, and, as a consequence, rendering the results unsatisfactory. The effect of continuing the dividend of the company upon the plan heretofore pursued would, in a few years, have been more apparent, and would have rendered a change of the most arbitrary nature immediately necessary, while the difficulty of making it would have been greatly augmented and the ability of the company to co-operate with the insured greatly impaired."

The charter was in evidence, and showed that the directors were by by-laws and resolutions to regulate dividends. The by-laws and minutes were not offered or called for. The secretary testified that the dividends declared in favor of C.'s policy were made in the fifth and subsequent years and were all applied in payment of the dividends for said years. The court excluded his further statement that under the rules of the company no policy-holder was entitled to a dividend until after four annual premiums had been paid. The decree allowed to A. a paid-up policy and also a dividend for each of the first four years.

*Held*, 1. As C. died before the second premium was paid, her administrator had no right to a paid-up policy.

2. The company having for eight years after C.'s death, treated A. as the beneficiary of the policy, it is estopped to deny his right to sue in his own name as such beneficiary.

3. The circular was not evidence that any dividend payable on C.'s policy had been declared.

4. Under the issue the policy was entitled only to dividends declared by the directors as payable upon it.

Judgment reversed and decree of common pleas modified.

## UNITED STATES CIRCUIT COURT OF VERMONT.

FITTON AND WIFE

vs.

FIRE INS. ASS'N, AND OTHERS.\*

An agreement to pay the premium at the rate specified is a sufficient consideration to make the agreement a binding contract. Generally, whatever is agreed to be done is considered in equity as done. The agreement to insure may be considered in equity as insurance.

When a contract is made out in any mode to be a preliminary contract of insurance, instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in such case cannot be denied.

If the agents of five insurance companies make an agreement with a party to insure her premises in four of their companies, naming them, such party has not, after destruction of her premises by fire, and before any policies are delivered to her, a claim against the fifth company for the loss, even though each of the five companies had written out policies for her.

If the agents of five insurance companies make an agreement with a party to insure her premises in four of those companies, naming them, such party has, after destruction of her premises by fire, a claim against the four companies named for the loss, even though there have as yet no policies been delivered to her, and such companies are proper parties in a suit to recover the loss.

In Equity.

MARTIN H. GODDARD, *for Orators.*

ALDACE F. WALKER, *for Fire Insurance Association.*

W. S. B. HOPKINS, *for Defendants.*

WHEELER, J.

From the allegations in the bill, which, on these demurrers, are to be taken as true, it appears that the duly authorized agents of all

\* Decision rendered, July 10, 1884. From *Federal Reporter*.

the defendants agreed to bind, from August 20, 1883, \$12,000 of insurance against loss by fire in the latter four of the defendant companies, at 3 per cent, on the property of the oratrix, and sent her a writing to that effect, without specifying anything about distribution of the risk among these companies. After a loss of the property the agents wrote policies in each of the defendant companies, dividing the amount into five equal parts among them, but, after learning of the loss, refused to deliver any of them, and all the defendants refuse to pay the loss.

On these facts the oratrix has not any claim, either at law or in equity, against the first defendant. The agents never entered into any preliminary contract to insure the oratrix in behalf of that company. If no companies had been named in the agreement with the oratrix, she probably might have held those which the agents intended to act for in that transaction, and the writing of the policies afterwards would be evidence of the intention. But here the companies bound are expressly named; and the contract of the oratrix was expressly with them, without leaving any room for implying any contract between her and other companies out of any intention or understanding of the agents, not known to or relied upon by her. And that company did not insure her, for the policy was not delivered to her, nor known of by her, until after the loss. She was not bound to receive it, and neither the agents or the company stood under any obligation to deliver it. Without delivery it was the act of but one party to it, which amounted to no contract at all as between the two, even if, with delivery, it would have been good after a loss not known at the time, without any contract providing for it previous to the loss. The contract with the other companies was an agreement to insure, not a contract of insurance.

The agreement to pay the premium at the rate specified was a sufficient consideration to make the agreement a binding contract. Generally, whatever is agreed to be done is, in equity, considered as done. The agreement to insure may in equity be treated as insurance. At law there could only be an action for the breach of the contract to effect the insurance. This might not be so full and complete a remedy as that which can be afforded in equity. The right to proceed in equity is well settled in such cases, in the courts of the United States, notwithstanding the statute establishing the boundaries of equity jurisdiction which has been in force from the beginning. Rev. St. § 723; *Tayloe vs. Merchants' Ins. Co.* 9 How., 390; *Commercial Ins. Co. vs. Union Ins. Co.*, 19 How., 321. The jurisdic-

tion depends upon the nature of the contract, and not, as has been argued, upon the difficulty or nature of the proof.

In this case the evidence is, apparently, in writing, and easy of production, while in some cases it has been in correspondence and oral communications, not so readily at hand for the purpose. But when the contract is made out, in any mode, to be preliminary contract for insurance, instead of a completed contract of insurance, the remedies upon it are the same, and may be enforced in the same way. The right to proceed in equity in this case cannot be denied, without disregarding these decisions of the highest court.

The contract is an entire one with the authorized agents of all the companies. The meaning of it may turn out to be that each should insure for one-fourth ; or that, as to the oratrix, all were bound in solido to the effecting of the insurance ; or some other construction may prevail ; but, whatever may be the ultimate result, all these defendants are liable upon it to the oratrix, and have a common interest in regard to it as between themselves, and all appear to be proper parties to this suit to enforce.

The demurrer is sustained, and the bill adjudged insufficient as to the Fire Insurance Association ; and the demurrers are overruled as to the other defendants, with leave to answer over by the sixteenth day of August.

## SUPREME COURT OF OHIO.

STATE OF OHIO, EX REL. ATTORNEY-GENERAL,

vs.

MONITOR F. ASS'N OF CINCINNATI, O. }

Revised Statutes, sections 3,686, 3,687, 3,688, 3,689, 3,690, authorize the formation of corporations to insure its members against loss by fire or other casualties, and empowers them to make and enforce among their members contracts of indemnity, by which those entering therein shall agree to be assessed specifically from time to time, as may be necessary to pay losses which occur to its members, and also to pay incidental expenses in the management of the business.

Such members are liable to be specifically assessed, from time to time, to pay losses which occur while they are such, but no member is liable to such assessment to pay losses occurring before he became a member, or which may occur after he ceases to be a member.

These sections do not authorize a contract with members, by which they, upon advance payment of an agreed annual deposit during the life of their policy, shall be exempted from liability to assessment to pay losses occurring during the year for which such prepayment was made; or by which a member's liability to assessment is limited, without regard to the amount that may be necessary to pay losses to fellow-members that may occur during such year.

These sections do not authorize the organization of corporations with a view to profit to its officers or members; therefore any plan or scheme by which profits are made or divided is unauthorized.

Section 3,680 authorizes the adoption by the corporation, of a constitution and by-laws regulating the assessment and collection of such sums of money as may be necessary to pay losses as they occur, and for incidental purposes; but it does not authorize a regulation by which a policy may be declared forfeited for the non-payment in advance of an annual deposit or premium, whether an assessment during such year to pay losses may be necessary or not.

Such an annual deposit paid in advance, based upon the hazards of the risk, and without reference to an amount necessary to pay losses that may occur during the year is in fact a premium paid for carrying the risk, and not a specific assessment authorized by the statute.

The funds derived from assessments upon members to pay losses to fellow-

members, are in their nature trust funds to be applied to the payment of such losses; hence the application of such funds, or of the annual deposits received in lieu of assessments, to the purchaser of the assets of another like corporation, including real estate not necessary to its business, or to the payment of losses to members of such other corporation whose risks it has assumed, is a misapplication of such funds.

### QUO WARRANTO.

Proceedings to oust the defendant from being a corporation under the laws of Ohio.

It is charged with having offended by the misuse of its franchises and privileges, and has exercised franchises and privileges not conferred, in the following, among other particulars, to wit. —

It has transacted a general fire insurance business, employing agents and soliciting business at great expense, and has collected money in advance from its members, and taking risks of the most hazardous character on property belonging to non-residents of the State, not members of the association.

It has purchased real estate in Canton, Ohio, said to be worth \$13,000, which it cannot use in the transaction of its business, and which was not intended for such use.

To obtain business, it has falsely represented to the public, that it is possessed of a guaranty capital of \$158,358  $\frac{1}{100}$  and aggregate assets amounting to \$174,955  $\frac{1}{100}$ .

It has borrowed money at large rates of interest to meet its losses, and has given its notes, for the payment of losses due.

Other specifications are made, not necessary to be here noted, as they are not material to the decision.

The answer admits that it became incorporated, December 28, 1883, under sections 3,686, 3,687, 3,688, 3,689, and 3,690 of the Revised Statutes of Ohio.

In answer to specification No. 1, it denies that it is doing a general fire insurance business, but admits that it has received, under its agreements with its members, made in conformity to its constitution and by-laws, a deposit on the issuing of the policy, which deposit is to be paid annually, at the beginning of each year during the continuance of the contract in such sum as may be assessed by the directors of the association, pursuant to the laws of the State of Ohio, and the constitution and by-laws of the association, but such assessment in no event to exceed in any one year the annual deposit. The object of this annual deposit in advance, is stated to be, to enable the defendant to meet promptly,

and without the expense of collecting assessments after a loss, as they might occur.

It denies taking risks of the most hazardous character, belonging to non-residents of the State, but admits issuing policies to its members residing outside of this State, on their application at its office in Cincinnati, Ohio, and insists that non-residents have the right under the law of becoming members.

In answer to the 4th charge, it denies having purchased real estate in Canton, Ohio, but admits that on the retirement of the Monitor Association of Canton, it received from the latter company a piece of real estate together with other property and assets, with the understanding that the defendant should apply the same to the payment of the debts of the Canton company, which defendant had assumed, and which have been so applied before the commencement of this action. The 5th, 6th, and 7th charges are specifically denied.

It appears from the proofs that prior to the incorporation of the defendant, there existed a corporation at Canton, Ohio, known as the Monitor Association of Canton, Ohio, organized under the same sections of the statute as this defendant is, and upon the same general plan. For the purpose of extending its business, that company resolved to remove its office and place of business to Cincinnati, Ohio. Upon application to the secretary of State for leave to make such transfer, it was ascertained that there was no law to authorize such removal—thereupon a number of the members of the Canton company obtained a like charter for the defendant corporation, under the name of the Monitor Fire Association, with its business office at Cincinnati, Ohio. Three days thereafter the board of directors of the Canton company held a meeting and adopted the following resolution :—

*Resolved*, That the building known as the Monitor Block, situated in Canton, Ohio, owned by the Monitor Fire Association, be sold, and that the president of the association be authorized and empowered to negotiate the sale of the same, and to execute and deliver title therefor, provided the price sold for shall not be less than twelve thousand dollars (\$12,000) cash.

The following was offered by Mr. Barrows, and seconded by Mr. Kugeman :—

*Whereas* : The Monitor Fire Association of Canton, Ohio,



decided by authority of a majority of its members, to transfer and remove its center, or business office, from Canton to Cincinnati, Ohio ; and whereas, there is no law of the State to confirm and ratify such change and removal ; and whereas, a charter has been obtained for the Monitor Fire Association of Cincinnati, Ohio,—therefore, in consideration of the premises, and for the purpose of continuing and carrying out the contracts of the Monitor Fire Association of Canton, Ohio, *Be it resolved*, by the directors of the Monitor Fire Association of Canton, Ohio, that the business and assets of the Monitor Fire Association of Canton, Ohio, be transferred and conveyed to the Monitor Fire Association of Cincinnati, Ohio ; said association to assume all risks, and carry out all contracts, and discharge all obligations of said Monitor Fire Association of Canton, Ohio.

*Resolved*, That the executive committee, be appointed a committee to carry out the resolution of directors, and complete and consummate the transfer of business to the Monitor Fire Association of Cincinnati, Ohio.

At the same time and place, the incorporators of the defendant, which consisted of the same persons, and perhaps others, who were members of the Canton company, organized the Monitor of Cincinnati, and adopted a constitution, by-laws, and a form of contract, or policy of insurance ; also the following agreement prepared by committees of two corporations, which shows the manner in which the Canton company transferred its property and business to the Cincinnati company, and the obligations which the latter assumed.

CINCINNATI, O., Jan. 4, 1884.

Board met pursuant to adjournment ; present—Mitchell, Kugelman, Henshaw, Meader, Sextro and Patterson. The following was agreed to :—

*Whereas* : The Monitor Fire Association of Canton, Ohio, has proposed to transfer risks, business, and assets to the Monitor Fire Association of Cincinnati, Ohio—now therefore, in consideration of the premises, and for the purpose of securing the risks, business, and assets of the Monitor Fire Association of Canton, Ohio, *Be it resolved*, That said proposition be accepted, and that the Monitor Fire Association of Cincinnati, Ohio, shall assume all risks, and discharge all obligations, of said Monitor Fire Association of

Canton, Ohio, and continue the business, according to the charter of said Monitor Fire Association of Cincinnati, Ohio, and such constitution and by-laws, as have been made and adopted.

*Resolved*, That Edward Henshaw and J. G. Sextro be appointed a committee to carry out the resolution of directors, and complete and consummate the transfer of the business of the Monitor Fire Association of Canton, Ohio, to the Monitor Fire Association of Cincinnati, Ohio.

The following was agreed to :—

Agreement made and entered into, January 4th, 1884, by and between the Monitor Fire Association of Canton, Ohio, and the Monitor Fire Association of Cincinnati, Ohio :—

That in consideration of the transfer of business and assets of the Monitor Fire Association of Canton, Ohio, the Monitor Fire Association of Cincinnati, Ohio, agrees to assume all risks and contracts, and discharge all liabilities and obligations of said association of Canton, Ohio, as fully as could be done by said association, without prejudice to the right or interest of the members of said association of Canton, Ohio.

In testimony whereof, the respective committees of said associations have signed their names, the day and year above written.

EMIL KUGEMAN,	} Committee, Monitor Fire Association of Canton, Ohio.
A. H. MITCHELL,	
J. F. MEADER.	

EDWARD HENSHAW,	} Committee, Monitor Fire Association of Cincinnati, Ohio.
JAS. G. SEXTRO.	

By resolution of the board, the officers of the defendant were instructed to proceed without delay to put into effect the agreement to transfer the business of the Canton company to defendant.

The property and assets of the Canton company, including said real estate, were transferred to the defendant, and it proceeded to take up the policies of the Canton company and substitute its own, but without requiring members of the Canton company who became members of the defendant to pay any advance deposit.

Such members became members of the new company by signing the constitution and accepting a policy in the latter for the unexpired term in the Canton company, thereby becoming full members of the new company, and liable to it for future annual deposits.

For a further statement of the facts, see the opinion of the court.

JAMES LAWRENCE, Attorney-General, *for Plaintiff.*

R. H. STONE and RAMSEY, MAXWELL and MATHEWS, *for Defendant.*

JOHNSON, C. J.

This corporation was formed under sections 3,686, 3,687, 3,688, 3,689 and 3,690 of the Revised Statutes, which are as follows :—

“Sec. 3,686. Any number of persons of lawful age, residents of this State, not less than ten in number, may associate themselves together for the purpose of insuring each other against loss by fire, and may make, assess and collect upon and from each other such sums of money, from time to time, as may be necessary to pay losses which occur by fire to any member of such association ; and the assessment and collection of such sums of money shall be regulated by the constitution and by-laws of the association.

“Sec. 3,687. Such persons shall make and subscribe a certificate, setting forth therein : 1. The name by which the association shall be known. 2. The place which shall be regarded as its center or business office. 3. The object of the association which shall only be to enable its members to insure each other against loss by fire and other casualties, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes, and for the payment of losses which occur to its members.

“Sec. 3,688. The certificate shall be filed in the office of the secretary of State, and a copy thereof duly certified by the secretary of State, shall be evidence of the existence and due incorporation of the association for the purposes therein named.

“Sec. 3,689. When such certificate is so filed and a copy thereof, so certified, forwarded to the association, the persons named therein shall elect their directors, and a president, secretary and treasurer, and such other officers as may be necessary for the complete performance of all the business and objects of the association herein provided, to serve for one year ; such officers shall thereafter be elected annually by the members of the association, at such time as shall be fixed upon in the constitution ; and such association so organized shall be known and held to be a body corporate for all the purposes aforesaid, and may sue and be sued, and plead and be impleaded in all courts of law and equity : but in no instance shall the

power to insure against loss by fire be exercised to others than members of the association.

"Sec. 3,690. Every such association shall adopt such constitution and by-laws, not inconsistent with the constitution and laws of this State or of the United States, as will in the judgment of its members, best subserve the interests and purposes of the association ; and all persons who sign such constitution shall be considered and held to be members of the association, and shall be held in law to comply with all the provisions and requirements of the association ; and the president or vice-president and secretary of every such association shall, annually on the first day of January, or within thirty days thereafter, prepare under oath, and deposit in the office of the superintendent of insurance a statement of the condition of such association on the thirty-first day of December then next preceding, exhibiting such facts as are enumerated in thirty-six hundred and fifty-four (3,654), and applicable to such associations, and such other information necessary to reveal the financial condition of such associations as the superintendent may require in a printed form to be by him supplied, to such associations for that purpose, and every such association which fails to make and deposit such statement, or to reply to an inquiry of the superintendent, shall be subject to a penalty of five hundred dollars, and an additional five hundred dollars for every month that it continues thereafter to transact any business of insurance." (80 v., 197.)

The declared object of the association, as stated in the certificate of incorporation, was—"Third. That the object of the association shall be to enable members to insure each other against loss by fire and other casualties, and to enforce any contract which may be by them entered into, by which those entering therein shall agree to be assessed specifically for incidental purposes, and for the payment of losses which occur to its members."

They adopted a constitution and by laws and issued policies of insurance, not on the plan of specific assessments, to pay expenses and losses as they should occur, but upon what is termed "the deposit plan." Instead of assessing its members from time to time, to pay incidental expenses and losses, they are required to pay an annual deposit in advance each year their policy runs. The amount of this annual deposit is based upon the hazards of the risk estimated by the executive officers of the association. The members are entitled to dividends out of savings to be declared each year. The power of the association to assess its members is thus limited :—

"Article X. The assessment liability of members shall be for each year of the term of the contract equal in amount to the annual deposit, but in no case shall any member be assessed in one year for an amount exceeding the annual deposit."

It is also provided in the by-laws that—"No. 5. All contracts of indemnity on which annual deposits shall fall due and not be paid, shall be deemed void until such annual deposit shall have been received by the association, and all contracts on which assessments have been made, and notice thereof given to the member, shall be void if not paid within thirty days from date of notice."

In a circular issued to the public is the following :—

"CINCINNATI, Ohio, April 7, 1884.

Guaranty capital.....	\$152,538.47
Surplus.....	16,742.66
<hr/>	
Total assets.....	\$169,281.18
No unpaid losses."	

By "guaranty capital" is not meant any actual capital, but simply the aggregate amount of promises by members to pay future annual deposits.

Thus a policy that has five years to run, has four annual deposits to be paid at the commencement of each year, and the amount of so-called guaranty capital is the amount of the five annual deposits on such policy. It requires no legal acumen to see that this advertised "guaranty capital" is a mere fiction, well calculated, if not intended, to deceive the public. The same is true as to what is called "aggregate capital." As the by-laws provide that on failure to pay an annual deposit the policy shall be void, it is evident that the promise to pay annual deposits are not absolute contracts to pay the money, but merely promises to be performed at the will of the member, and therefore, only conditionally, assets of the company, payable if assessments become necessary. The "surplus" which is advertised is also deceptive in its nature. As explained by the officers, it means the excess of assets over liabilities, and not a particular fund set apart to cover losses, or for reinsurance. If their valuation of the assets is too high, as is generally the case, or their liabilities are greater than their books show, then this so-called surplus might amount to nothing.

The provisions of the statute above cited, and under which the defendant is incorporated, are very general in their terms. In view of

the important interests involved by introducing a new system of fire insurance into this State before unknown, it is to be regretted that such safeguards as are proper have not been provided, specific as to the mode and manner of transacting business.

These sections do, however, place a specific limitation on the powers of such corporations. So far as these limitations apply to the case at bar we will state them.

1st. They do not authorize the organization of a corporation having a capital stock, and its members are not stockholders in that sense which subjects them to individual liability, to an amount equal to his stock in addition thereto.

2d. Such corporations cannot be organized with a view to profit. The law imposes a trust upon the officers for the mutual benefit of all the members, and permits insurance, the losses to be paid by specific assessment upon members. They may assess and collect, upon and from each other such sums of money from time to time, as may be necessary for incidental purposes, as well as losses which occur to its members.

These incidental purposes include the necessary expenses of administering the trust. Any scheme of management which contemplates profits or dividends is unauthorized.

3d. This corporation is not formed upon the theory of specific assessments upon members, made from time to time to pay losses as they occur, but upon what is called the annual "deposit plan." An estimated amount determined by the hazard of the risk is fixed by previous contract with each member, which he pays annually in advance, in lieu of a specific assessment made from time to time as losses occur. By the terms of this contract, "The assessment liability of members shall be for each year of the term of the contract, equal in amount to the annual deposit, but in no case shall any member be assessed in one year for an amount exceeding the annual deposit." Thus, the liability of members to assessment is expressly limited, regardless of the losses to be paid during any given year. Some doubt is expressed as to the true meaning of the provision above quoted. Whether it means that the payment of the annual deposit, frees the member from an assessment during that year, or limits the assessment during that year to an additional amount equal to such deposit, it is immaterial now to decide, as in

either view, it is a limit on the assessment liability of members which is unauthorized. Every member who meets with a loss is entitled to call upon his fellow-members to share it with him, and these fellow-members owe it as a duty to contribute sufficient for that purpose.

The present scheme is radically wrong. It seeks to relieve members from this burden, and may deprive the insured of his full indemnity, unless the corporation borrows money in anticipation of the receipt of future annual deposits, which it has no right to do. The evidence shows that the defendant has been compelled to borrow money for this purpose.

It may be said that members have agreed to such limit to their assessment liability, and therefore the maxim *volenti fit non injuria* applies. To this, we answer that we are called upon to determine what are the rights and powers of this corporation, and whether they are exercising franchises and privileges not granted, and not what are the rights of members under this contract of indemnity.

4th. The statute contemplates specific assessments of members from time to time, to pay losses as they occur. These assessments must be devoted to the payment of such losses, so far as may be needed. No member can be assessed to pay a loss which did not occur during his membership. Hence, the use of funds derived from members to pay losses prior to their becoming such, or after they cease to be such, is unauthorized.

This corporation is not authorized to borrow money to pay losses, expecting to be re-imbursed from future payments of annual deposits by new members.

5th. This corporation had no power to purchase the property of a similar corporation which had been doing business at Canton, Ohio.

The assets which it received by virtue of that purchase amounted to \$21,633.<sup>50</sup>/<sub>100</sub>, of this amount \$13,000 was the estimated value of real estate in Canton, not needed, nor used, nor necessary for its corporate business, and which under the statute it had no right to pay.

For the first six months of its business, it received in the way of annual deposits or premiums from its members \$23,201.<sup>50</sup>/<sub>100</sub>, and during the same time paid sundry liabilities of the Canton company, \$18,687.<sup>50</sup>/<sub>100</sub>, thus devoting a large amount of money collected from its members, as but little of the assets of the Canton company had been converted into cash to pay losses and other liabilities of the latter company.

6th. The evidence shows that this company is engaged in a general fire insurance business as distinguished from a co-operative mutual company upon the assessment plan.

The "annual deposit" required is but another name for annual premiums. If these annual deposits exceed the necessary expenses and losses during a given year, they are treated as "savings" out of which dividends are made to those who may then be members. As a consequence, if the annual deposits exceed the expenses and losses, there is a net profit to be divided or carried forward each year, derived from those who may not be members the next year, but if expenses and losses exceed the receipts from such source during a given year, the deficit becomes a burden upon succeeding members, equally with those who were members when the losses occurred, and so continued. Those who were members when the loss occurred, and ceased to be such before the deficit was ascertained, were free from this burden.

7th. By-law No. 5, provides, "All contracts of indemnity on which annual deposits shall fall due and not be paid shall be deemed void, until such annual deposits shall be received by the association." The statute authorized the association to adopt a constitution and by-laws regulating the assessment and collection of such sums of money as the parties have agreed to be specifically assessed, for incidental purposes and for the payment of losses, but it does not authorize the forfeiture of a contract for non-compliance with the provisions of a contract which it was not authorized to make, to wit, for the non-payment of a deposit in advance, to pay losses that may or may not afterwards occur.

This by-law which forfeits the policy for non-payment of an annual deposit, not covered by a specific assessment, and which may not be needed to pay losses then due, and in advance of any losses for which a member is liable to assessment, is the exercise of the power of forfeiture not authorized by the statute. Something has been said in argument in favor of the comparative merits of the system of insurance based upon this plan of annual deposits in advance. We are not called upon to consider or determine the comparative merits of the various plans upon which companies are organized for insurance. The assessment plan authorized by the statute under review has been thought by the law-making power to be worthy of adoption in this State. It doubt-



less has its merits, and is entitled to equal regard before us with any other plan sanctioned by law.

While it may be wise, prudent, and within the scope of its authority, to require prepayment of a premium or annual deposit by members to be covered by specific assessments to pay expenses and losses which occur while they are members, yet the scheme before us, which requires such annual deposits from those who are the members, to accumulate a fund to pay losses, after they have ceased to be such, or before they became members, is not insurance upon the assessment plan, but upon the general plan of stock companies.

The plan upon which this company is organized and doing business, may have much to commend it, if sanctioned by legislative authority. It is due to those engaged in the management of this corporation to say that there is nothing to impeach their integrity and good faith, yet we are compelled to hold that they have misinterpreted the provisions of the law providing for insurance on the assessment plan, and that they have been doing business upon a plan unauthorized by these provisions of the statute.

Judgment of Ouster.

SUPREME COURT OF INDIANA.

*Appeal from the Vigo Circuit Court.*

WILLIAM McLEAN, AD'M, *de bonis non* OF THE  
ESTATE OF WILLIAM S. RYCE, DECEASED,

vs.

EQUITABLE LIFE ASSURANCE SOCIETY  
OF THE UNITED STATES.\*

The effect of a demurrer against the evidence is to concede as true all facts against which there is any evidence, and to exclude the evidence of the party demurring, and if on such evidence a jury might rightfully find against the party demurring, the demurrer should be overruled.

The agent represented to the executor claiming the proceeds of a life policy, that it was worthless; that he had obtained sufficient evidence to defeat the claim, and finally induced the executor, who was in great distress and financial trouble at the time, to compromise the claim.

*Held*, That where such a compromise was secured by false and fraudulent representations to an old man whose faculties were impaired by trouble, the balance of the claim may be recovered, the settlement was vitiated by the fraud.

A court may look beyond the demurrer to the evidence and inquire into defects in the declaration. A party demurring to evidence is not precluded from afterwards presenting on appeal questions properly reserved, arising on the pleadings.

A harmless error cannot be complained of on appeal.

COLERICK, C. J.

This action was originally brought by Lucius Ryce, as the executor of the last will of his son William S. Ryce, deceased, to recover an alleged balance due upon an insurance policy issued by the appellees upon the life of said William S. Ryce, for the sum of \$10,000,

\* Decision rendered, December 11, 1884.

payable on the 25th day of July, 1888, to the assured, if he should then be living, and in the event of his death before that time, then to his executors, administrators, or assigns, in sixty days after due notice and proof of his death. During the pendency of the action said executor died, and the appellant, as the administrator de bonis non of the estate of the assured, was substituted as the plaintiff therein. The complaint consisted of three paragraphs, to which separate demurrers were overruled.

A motion was made to strike out parts of the complaint, which was also overruled, and, thereupon, the appellee answered the complaint, to which answer a reply was filed. The issues so formed, were submitted to a jury for trial, and after the appellant had introduced his evidence in support of the complaint, the appellee demurred to the evidence, and the demurrer was sustained by the court, to which ruling the appellant duly excepted, and, thereupon, final judgment was rendered in favor of the appellee, from which the appellant appeals, and assigns as error, for its reversal, the ruling of the court in sustaining said demurrer. The appellee has filed an assignment of cross-errors, in which it assigns as errors, the rulings of the court upon the demurrers to the several paragraphs of the complaint, and on the motion to strike out parts of the complaint. It is unnecessary to refer more specially to the pleadings in the action, except the complaint. The first and second paragraphs, in their material averments, were, in substance, alike. They both averred the issuing by the appellee of the policy of insurance, above referred to, and its acceptance by the assured, who, until his death, observed and performed all of the conditions of the policy on his part, and the appointment and qualification of the plaintiff, as such executor, and the furnishing by him of the proof, required by the policy, of the death of the assured, and alleged that the appellee by certain false and fraudulent representations, made by its authorized agent, which were fully recited therein, induced the plaintiff to settle the claim existing in favor of the estate of the assured upon said policy by accepting and receiving in full payment thereof, \$7,000, less than the amount actually and legally due thereon, and prayed judgment against the appellee for the difference between the sum so paid and the amount that was due on the policy. The third paragraph was founded upon the policy of insurance, but unlike the other paragraphs, failed to aver any excuse for not making the policy, or a copy thereof, a part of the pleading.

The vital question presented for our consideration is, Did the

court err in sustaining the demurrer to the evidence? Before presenting a synopsis of the evidence, it is proper, if not essential for us to advert to certain rules that have been established for the guidance of courts in the consideration by them of the evidence in a cause, where, as in this case, a demurrer to the evidence has been interposed. The effect of the demurrer is to concede the truth of all the facts of which there is any evidence against the demurring party, and if there is a conflict in the evidence, prevents him from insisting upon the benefit of any evidence in his favor as to the disputed facts. *Walcotts vs. Northwestern Mutual Life Ins. Co.*, 81 Ind., 301. The demurrer admits all facts which the evidence tends to prove, and all such inferences as can be reasonably drawn therefrom, *supra*. *Radcliff et al. vs. Radford*, 96 Ind., 482

It excludes from consideration the evidence of the party demurring: *Ruddell vs. Tyner et al.*, 87 Ind., 529, which is to be treated as withdrawn. *Adam's Assignee vs. State et al.*, 87 Ind., 573, as the evidence of his adversary is alone involved in the issue raised by the demurrer. *Fritz vs. Clark*, 80 Ind., 591.

If upon such evidence, with every reasonable inference which may be drawn therefrom, a jury might rightfully find against the party demurring, the demurrer should be overruled. *Hagenbuck et al. vs. McCloskey*, 31 Ind., 577; *Nordyke and Marmon Co. vs. Van-Sant*, 4 Ind. Law Mag., 165, as the party by demurring admits all facts of which there is any evidence. *Trimble et al. vs. Pollock*, 77 Ind., 576, and consents that whatever reasonable inferences can be, shall be drawn from the evidence against him. *Ruff et al. vs. Ruff*, 85 Ind., 431, and the court is bound to take as true all the facts which the evidence tends to prove, and such inferences from them as the jury could have fairly drawn, though the jury might not have drawn them. *Ohio etc. R. W. Co. vs. Collam*, 73 Ind., 261, but the court is not required in considering the demurrer, to weigh or reconcile conflicting evidence, nor consider that which favors the party demurring when it is in conflict with other evidence against him. *Indianapolis etc. R. R. Co. vs. McLin*, 82 Ind., 435.

The demurrer waives objections to the admissibility of the evidence. *Miller, Trustee, vs. Porter*, 71 Ind., 521. And no advantage can be taken of any defect in the pleadings, as a reason for sustaining the demurrer. *Lindley vs. Kelly*, 42 Ind., 294.

As sustaining a demurrer to evidence works a final disposition of the case, the court does not err in overruling such a demurrer wherever there is testimony which, although weak and inconclusive,

fairly tends to prove every material fact, and is sufficient to justify a court in overruling a motion to set aside a verdict based thereon. *Kansas Pacific R. W. Co. vs. Couse*, 17 Kan., 571. And if from the evidence a jury might infer that the plaintiff's action should be sustained, the demurrer should be overruled and the plaintiff should have judgment. *Wright, Ad'm., vs. Julian, et al.*, 4 Ind. Law Mag., 35; *L. S. & M. S. R. W. Co. vs. Foster*, 3 Ind. Law Mag., 196.

Keeping in view, and applying to this case, so far as they are applicable, the rules to which we have referred, we will briefly present the facts in the case.

It appears by the evidence that the assured was, for many years before and at the time of his death, a dry-goods merchant in the city of Terre Haute, Indiana. He died at Grand Haven, Mich., on the 18th day of August, 1877, of chronic inflammation of the stomach, with which he had been afflicted for two or three years immediately preceding his death. The policy of insurance referred to in the complaint, was issued to him by the appellee on the 2d day of August, 1865, upon which he paid to the appellee each year thereafter until his death, covering a period of twelve years, the annual premiums thereon as they became due and payable, amounting in all to \$4,680.80. No evidence was introduced even tending to prove that any misrepresentations were made by him in his application or otherwise, to secure the issuing of the policy, or, that he in any manner after its issue, violated any of its conditions. He was about forty-three years old at the time of his death. By the provisions of his will he appointed his father, Lucius Ryce, now deceased, the executor thereof, and he after first qualifying as such executor, furnished appellee with the proof required by the policy as to the time, place, and cause of the death of the assured.

About the 19th day of October, 1877, the appellee sent an agent to Terre Haute, Indiana, where the executor resided, to adjust the claim, and, for that purpose, the agent called several times upon the executor, and had interviews with him in relation to its adjustment. The only evidence as to what transpired between them, at these interviews, was rendered by the executor, who stated, that the agent informed him that the policy was not "worth a cent;" that he had been to Grand Haven, Michigan, where the assured died, and discovered "something" that "was fatal to the policy," and had secured sufficient evidence "to defeat the policy," and that the company would not pay the claim, but would contest the same. After the agent had impressed the executor with the belief that the

company would not pay the claim, and that the company could, and would, defeat its collection, he stated to the executor that he thought it would be right for the company to pay the sum that the assured had paid to the company, with interest thereon, and, after computing the amount thereof, he offered to pay the same in full payment of the claim, which offer the executor accepted, and surrendered the policy. He also testified that at the time these interviews occurred, and the settlement was made, he was, "in great distress of mind," and "was hardly fit to do business," and "did not know what he ought to do," and that debts were troubling him, which he wanted to pay, but could not, and that he "had sacrificed everything he had of his own to pay the debts," and that he had been induced to accept the offer of settlement by reason of the representations that were made by the agent.

The facts to which the executor testified, above set forth, were not disputed, nor was his evidence in conflict with, or impaired by, any other evidence rendered in the cause, but, on the contrary, was strongly supported and corroborated, in many of its essential features by other evidence. A number of prominent business men of the city of Terre Haute, Indiana, who were personally and intimately acquainted with him, and had been for many years, testified that from the time of the death of his son, and for months afterwards, embracing the time when the settlement occurred, he appeared to be in great mental distress, caused by the death of his son, and his own financial embarrassments, as the surety of his son. His liabilities as such surety, amounted to about \$80,000, and to pay them he sacrificed all of his property. He was about seventy-three years old at the time of the settlement, and was then very feeble in body and mind. It was admitted on the trial that at the time of the settlement, the policy, and its accumulations, by way of dividends, amounted, in all, to \$12,078.

The amount that was paid by the appellee, under said settlement, was \$7,136.08, which was \$4,941.92 less than the amount that was due on the policy.

The representations so made by the agent of the appellee were false, and, we think, fraudulently made by him to induce the settlement. The question presented to us by these facts is, whether the law will permit the appellee, under a settlement procured by such means, to withhold the payment of the balance that was confessedly due to the plaintiff, as such executor, on the policy, and thereby enable the appellee to secure and enjoy the fruits of the fraud that

was committed by its agent, in inducing by false and fraudulent representations, an aged man, whose mental faculties were impaired and shattered by age and financial disasters, and whose heart was sorely afflicted by domestic calamities, rendering him helpless to resist the influence of the cunning arts that were practiced upon him by the wily and unscrupulous agent, to enter into a contract that was, in its terms, grossly unjust to the estate which he represented. We think not. The law is strong, and protects the weak and helpless against such machinations, and, being just, defeats their consummation. The evidence sustained the averments in the first and second paragraphs of the complaint, and the court should have rendered judgment thereon in favor of the appellant. The fact that the money received by the executor was paid to him by the appellee a few days before the time that he could have legally demanded, and, by suit, enforced its payment, is of no consequence, as it does not appear, by the evidence that its payment, before maturity, was the consideration, in whole or in part, for the settlement of the claim. It is unnecessary to consider or determine the question presented by the appellee as to the power of the executor, under the provisions of the will, to adjust and settle the claims, without first applying to the court for an order authorizing and empowering him to do so, as the fraud that was practiced by the appellee, through its agent, vitiated and destroyed the legality of the settlement that was made.

The appellee insists that the court erred in overruling the demurrers to the several paragraphs of the complaint. We think that the first and second paragraphs were sufficient. The third was insufficient, because it was founded on the policy of insurance, and failed to make the policy, or a copy thereof, a part of the pleading, or, by proper averments, show a sufficient excuse for not doing so. The appellant seeks to avoid the effect of the erroneous ruling of the court in overruling the demurrer to this paragraph of the complaint, by asserting that the objection thereto, if well taken, was waived, or abandoned by the appellee, in demurring to the evidence, and that he is precluded thereby from now assailing, in this court, on appeal, the sufficiency of the complaint.

This question has been considered and determined by the Supreme Court of the United States, in *United States Bank vs. Smith*, 11 Wheaton 171 (24 U. S. R., 171), where it was correctly, we think, said: "It is alleged, however, on the part of the plaintiffs, that this court cannot look beyond the demurrer to the evidence, and inquire

into defects in the declaration. The position cannot be sustained. The doctrine of the King's Bench in England, in the case of *Cort vs. Berkbeck*, 1 Doug., 208, that, upon a demurrer to evidence, the party cannot take advantage of any objection to the pleadings, does not apply. By a demurrer to the evidence, the court in which the cause is tried, is substituted in place of the jury, and the only question is, whether the evidence be sufficient to maintain the issue. And the judgment of the court upon such evidence will stand in the place of the verdict of the jury, and after that the defendant may take advantage of the defects in the declaration, by motion in arrest of judgment, or by writ of error. But the present case, being brought here on writ of error, the whole record is under the consideration of the court, and the defendant having the judgment of the court below in his favor, may avail himself of any defects in the declaration that are not deemed cured by the verdict." This decision is in harmony with the views recently expressed by this court in *Bish vs. Van Cannon*, 94 Ind., 263, where it was said: "But upon appeal we see no good reason why the demurrer to the evidence should waive the demurrer to the complaint; by the demurrer to the complaint being overruled, the defendant was compelled to take issue upon the complaint as it was, and submit to a trial. A demurrer to evidence is only one of the modes of trial and only tests the sufficiency of the evidence."

It is true that the question was not decided by this court in the case last cited, but we now hold that a party who demurs to the evidence, is not thereby precluded from afterwards presenting to this court on appeal, questions arising upon the pleadings, which he may have properly reserved in the court below, or from assailing by motion in arrest of judgment, or assignment of error in this court, the sufficiency of the complaint the same as if no such demurrer had been filed, as objections to the pleadings in an action are to be deemed as waived in demurring to the evidence.

Although the court below erred in overruling the demurrers to the third paragraph of the complaint, it was a harmless error, as the evidence in the cause fully and clearly sustained the first and second paragraphs of the complaint, which were sufficient, and under which the evidence was evidently introduced. It was the duty of the court below to have applied the evidence to those paragraphs, and rendered judgment thereon alone, in favor of the appellant.

See *Stolle vs. Aetna Fire & Marine Ins. Co.*, 10 W. Va., 546, which was an action like this, on a policy of insurance. The complaint con-



sisted of two paragraphs, to which demurrers were overruled, and thereupon issues were formed thereon, and tried by the court.

A demurrer to the plaintiff's evidence was filed and overruled, and judgment rendered in favor of the plaintiff. On appeal to the supreme court, the judgment was affirmed, although it was held that the court below erred in overruling the demurrer to the first paragraph of the complaint. The court said: "The evidence then sustaining the plaintiffs case, as set forth in the second or general count, the court properly entered up the judgment for the plaintiff, and it should not be set aside because the first count was defective and the demurrer to it ought to have been sustained. For, though the court erred in overruling this demurrer to the first count, and would also have erred in rejecting the special plea (answer) had it been in proper form, yet these errors of the court have resulted in no injury to the defendant; there being a demurrer to the evidence, the court sees the whole case, and being of opinion that the evidence received by the court was all properly received upon the issues joined on the second count, and this second count being sustained by the evidence, finds no error injurious to the defendants."

If the court below in this case had so performed its duty, it would have appeared, affirmatively, by the record that no judgment was rendered in favor of the plaintiff on the third paragraph of his complaint, and in the face of such a record the appellee would have been precluded from assailing in this court the correctness of the ruling of the court below in overruling the demurrer thereto, as the ruling, if erroneous, would have been regarded and treated under the well-settled practice of this court, as a harmless error, of which the appellee could not complain. See *Johnson vs. Ramsay*, 91 Ind., 89; *Busk, Pr.*, 284; 1 *Work's Pr.*, sec. 528; *McComas vs. Haas*, 93 Ind., 276; *The State etc. vs. Julian*, 93 Ind., 292, and the cases there cited. *Bartlette vs. Pittsburgh etc. R. W. Co.*, 94 Ind., 281; *Louisville etc. R. W. Co. vs. Davis*, 94 Ind., 601.

The court below having failed to so apply the evidence, it became necessary for us to examine and consider it with reference to those paragraphs of the complaint which we have done, and find that it is amply sufficient to sustain them, and, therefore, we think that the court erred in sustaining the demurrer to the evidence, and, for the error so committed, the judgment ought to be reversed.

It is insisted by the appellee that the court erred in overruling the motion to strike out parts of the complaint. If any error was committed by the court in its ruling, it is not an available one.

As stated by this court in *Rome, Assignee, vs. Major et al.*, 92 Ind., 206: "It will suffice to say that under repeated decisions of this court, even if the ruling were erroneous, it would not constitute an available error for the reversal of the judgment. The motion to strike out is based upon the theory that the objectionable matter in the pleading is mere surplusage, and where the motion is overruled, the effect of the ruling is, at most, to leave surplusage in the record, which will not vitiate the pleading if it is otherwise good."

See to same effect, *Lorey et al. vs. Bond et al.*, 94 Ind., 67. Nor was the ruling properly reserved for our review, as it was not embodied as it should have been, in a bill of exceptions.

The following recital appears in the record at the conclusion of the evidence: "It is at this point agreed by and between the parties that at the time when the receipt was made the policy and its accumulations amounted to \$12,078."

The receipt was executed on the 19th day of October, 1877, and the sum paid by the appellees on the policy was \$7,136.08, being \$4,941.92 less than the sum that was due thereon.

PER CURIAM.

The judgment of the court below is reversed at the costs of the appellee, and the cause is remanded with instructions to the court to overrule the demurrer to the evidence, and render judgment in favor of the appellant on the first and second paragraphs of the complaint, for \$4,941.92, with six per cent interest thereon from the 19th day of October, 1877, with costs.

## SUPREME COURT OF TEXAS.

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Appeal from Ellis County.

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FIRST NATIONAL BANK OF WAXAHACHIE

vs.

LANCASHIRE INS. CO.\*

Suit on insurance policy issued on goods, wares, merchandise, produce and other property owned or held in trust or on commission, or sold and not delivered, by the insured, at certain designated places. The property destroyed was cotton purchased by K. with funds belonging to the insured, under an agreement that when K. sold the cotton he was to pay the insured the money, and if shipped, the bills of lading were to be taken in the insured's name or assigned to it. The cotton was not in any place designated by the policy.

*Held*, A demurrer was correctly sustained to the petition setting up these facts, as it furnished no good cause of action.

An insurance policy must be construed according to its terms and the evident intent of the parties to be gathered from the language used. The court cannot extend the risk beyond that fairly within the terms of the policy.

Custom or course of dealing between parties, like other extraneous facts or circumstances, may sometimes be looked to in order to interpret what is doubtful, but not to contradict that which is plain.

Although a custom or usage be inconsistent with the printed conditions of the policy, it may nevertheless be shown, not to alter or vary the contract, but to show that such conditions were waived.

The agent of an insurance company, keeping within the limits of his authority, may, by his acts, and sometimes by his failure to act when he should do so, dispense with conditions or waive forfeitures, and thus bind the company. But such cannot be done in cases like this, where the power of the agent is defined and limited in the policy of which the insured must take notice.

S. C. McCORMICK, for Appellant.

RAINEY and GROSS, for Appellee.

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\* From Texas Law Review.

*Statement.*

In October, 1882, appellee issued to Patrick, McMillan & Co. an open policy of insurance, for the purpose of insuring against loss or damage by fire such property as might be entered by appellee's agent in a book attached to the policy.

This policy was, with the consent of appellee, assigned in October, 1883, to appellant. Appellee received, first, from Patrick, McMillan & Co., and afterward from appellant, a great number of premiums under said policy, and made a corresponding number of entries in the book attached to the policy. Among the entries made in the book was that of November 1, 1883, whereby appellant claimed to be insured from November 1, 1883, to November 6, 1883, to the amount of \$6,000 on certain cotton specified in the entry. This cotton having been destroyed by fire on the fifth day of November, 1883, appellant sued appellee in the district court of Ellis County, making the above-mentioned policy the basis of the suit, setting up its issuance to Patrick, McMillan & Co., its assignment to appellant, the entry of November 1 in the book attached to the policy, the destruction by fire of the cotton specified in the entry, and various matters.

To appellant's first amended original petition appellee presented demurrers, general and special; and these having been sustained by the court, and appellant declining to amend, a final judgment was entered against appellant, dismissing the amended petition, and awarding costs to appellee. From this judgment sustaining the demurrers of appellee and dismissing appellant's cause of action, appellant prosecutes an appeal.

The part of the policy which sets forth particularly the character and limitations of the contract, the character of the property insured, the relation of the assured to the property, its locality etc., reads:—

"Whereas Patrick, McMillan & Co. have paid as per indorsement, the sum of ——— dollars to the Lancashire Insurance Company, for insuring from loss or damage by fire the property hereinafter described, not exceeding the sum specified on each article, viz.: on goods, wares, merchandise, produce, or other property, \* \* \* their own, or held by them in trust or on commission, or sold but not delivered, as shall be specified and indorsed in the book attached by this company or its legally authorized and commissioned agents, and for such amounts in such storehouses and places, and at such rates of premium as shall be approved and indorsed in book

attached hereto by one of the officers of this company, or its legally authorized and commissioned agents at Waxahachie, Texas. No entry to be binding on this company until countersigned by the duly authorized and commissioned agents of this company; \* \* \* The said Lancashire Insurance Company hereby agree to make good unto the said assured, their executors, administrators, and assigns, all such immediate loss or damage, not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property, except as herein provided, as shall happen by fire to the property so specified and located, but not otherwise or elsewhere, from the fourteenth day of October, 1882, at 12 o'clock at noon, until revoked.'

The plaintiff first alleged that the cotton destroyed was its own. It then alleged that, if not its own, the cotton was held by it in trust, as follows: If the cotton was not its own, or held by it in trust, that "said policy and said entry (No. 12) in said book covered and insured, and was intended to cover and insure, all cotton at and between said dates on, and to be placed on, said yard, purchased by one S. W. King, and paid for with funds of plaintiff in pursuance of an agreement and understanding between plaintiff and said King; that the cotton so purchased and paid for should secure and stand bound for said money; that the proceeds of such cotton, when sold, should go and be paid to plaintiff; that the bills of lading for such cotton when shipped off for sale, should be issued in the name of, or be assigned to, plaintiff; the said agreement being that plaintiff should, in effect, be the owner of said cotton, and being made to the end that the funds of plaintiff used in the purchase of the same, might be repaid and made good to plaintiff out of the proceeds of said cotton."

Plaintiff further set up that the defendant was estopped to deny that it was the owner of the cotton; for that, at the date of the entry (No. 12) and long before, it knew all about the arrangement between plaintiff and King in the purchase of cotton, and with like knowledge had previously taken similar risks on cotton so purchased by King with funds of plaintiff, and received the premiums therefor, thus inducing plaintiff to believe that the cotton so purchased came within the terms of the policy; and that but for these facts plaintiff would have taken out another policy, etc.

Appellee filed a general demurrer and the following special exceptions, which being sustained, and appellant declining to amend, the cause was dismissed—to wit:—

1. "That a recovery was sought upon an alleged intent of the parties to the contract sued on different from the plain meaning of the words of the contract.

2. "That it was sought to form a basis for the introduction of parol evidence to vary the meaning of the plain terms of a written contract.

3. "That the allegations of usage and custom were insufficient to estop defendant from insisting on a construction of the contract sued on according to the plain meaning of its language.

4. "That no such case of misrepresentation, fraud, accident, or mistake, as would warrant a departure from the plain meaning of the terms of the contract sued on, was stated.

\* \* \* \* \*

6. "That the interest of appellant in the cotton intended to be insured by said entry No. 12 was not covered by the terms of the policy.

\* \* \* \* \*

8. "That S. W. King was no party to the contract sued on, had no assignable interest therein, and appellant could claim nothing as his assignee."

DELANY, J., adopted.

Notwithstanding the length of the pleadings and the number of assignments of error, the questions to be determined in this case are very few.

The policy was originally issued to Patrick, McMillan & Co., and by them transferred to the plaintiff with the consent of the insurance company. Under this policy, goods, wares, and merchandise might be insured ; but only under certain circumstances. By the written terms of the policy the assured must sustain certain definite relations to the property. It must be its own property, or held by it in trust or on commission, or sold but not delivered. It must also be at the place specified in the entry which, by the terms of the contract, was to be made in the book accompanying the policy.

It is easy to see why the plaintiff in its pleadings did not rest

content with the allegation that the property destroyed was its own, or was held by it in trust. In either case the petition would have been good upon demurrer, because it would have stated a case which came full within the terms of the policy. But as the proof might not have sustained such allegations, it was necessary to set out the real condition of the property which was destroyed, and for the loss of which plaintiff sought a recovery. And thus it appears that the property destroyed did not belong to the plaintiff, and was not held by it in any of the capacities mentioned in the policy. It belonged to one King. He had bought it with funds advanced by the plaintiff upon an agreement that when it was sold he was to return the money. This was a personal trust reposed by the plaintiff in King. There seems to have been a further agreement between them, that if the cotton was shipped, the bills of lading should be taken in the name of, or be transferred to, the plaintiff.

In the event of a shipment, the bills of lading being taken in the name of the plaintiff or transferred to it, would have passed to it the legal title. Still the property would not then have been covered by the policy, because it would have been thus removed from the place, and the only place at which the risk would attach.

The language of the policy is plain and unambiguous. There is no room for construction; and the defendant has a right to insist upon the letter of the contract as it was made. Innumerable authorities might be cited to sustain this elementary rule; and we refer to one, only to show how strictly the courts have enforced it in insurance cases.

"The policy," says Mr. Wood in his work on Insurance, "must be construed according to its terms and the evident intent of the parties, to be gathered from the language used, and the court cannot extend the risk beyond what is fairly within the terms of the policy." [Sec. 67, p. 157.] And he gives as an example the following case lately decided in England: "A time policy against fire was effected on a steamship. The policy described it as then 'lying in the Victoria docks,' but gave 'liberty to go into dry dock, and light the boiler fires once or twice during the currency of the policy.' The only dry dock into which the ship could go was Lungley's dock, some distance up the river. To go there it was necessary to remove the paddle wheels. They were removed in the Victoria docks, and the ship was then towed up to Lungley's dock. The necessary repairs there having been completed, the ship was brought out and moored in the river, preparatory to replacing the paddle wheels. This

operation could have been perfectly performed in the Victoria docks, but it was found that in such case it was customary, as the more economical course, to replace the paddle wheels while the ship lay in the river. Before the wheels had been replaced the ship was burnt. The court held that the policy covered the ship while in the Victoria docks, and while passing from them to the dry dock, and while returning directly from the dry dock to the Victoria docks; but did not cover the vessel while moored in the river for a collateral purpose."

One of the judges said: "To construe the policy as allowing the vessel to remain in the river while the paddle wheels were replaced, would be to add a new condition to the policy, which cannot be done." [See also *Home Ins. Co. vs. Warehouse Co.*, 3 Otto, 527.]

We may admit that the plaintiff had an insurable interest in the property, and might have taken out a policy to protect that interest, but it was no such an interest as was protected by this policy.

There is only one other question. Appellant insists that although the policy, if strictly construed, might not cover the property in question, still by its course of dealing with the plaintiff, it is precluded from adhering to the strict letter of the contract, and has committed itself to a more liberal interpretation which would cover the interest of appellant in the property. To this end, it is set forth in the petition that the defendant took the present risk with full knowledge of the nature of plaintiff's interest in the cotton; that after this, it had taken a number of risks on cotton bought by King with the money of plaintiff, just as this had been, and had received the premiums with full knowledge of all the facts, and had thus induced the plaintiff to believe that the terms of the policy would cover and protect the interest of plaintiff in the cotton.

To this we may reply, that custom or the course of dealing between parties, like other extraneous facts, may sometimes be looked to in order to interpret what is doubtful, but not to contradict what is plain. [Wood on Ins., sec. 501, pp. 848-9.]

The author remarks in the section just quoted, that although a custom or usage be inconsistent with the printed conditions of a policy, it may nevertheless be shown, not to alter or vary the conditions, but to show that such conditions were waived.

It is well settled that the agent of an insurance company, keeping within the limits of his authority, may, by his acts, and sometimes by his failure to act when he ought to have done so, dispense with conditions or waive forfeitures, and thus bind the company. And



we think that most of the cases cited by counsel for appellant will fall within that class. Among them is the case of the Crescent Ins. Co. vs. Griffin et al. [1 Texas Law Review, 326.]

There the policy contained a provision to the effect that "if the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of this company written hereon, \* \* \* then, and in every such case, this policy shall be void." As a matter of fact other insurance was obtained upon the property, and the agent of the company was informed of the fact. It was his duty to indorse the consent upon the policy, or to see that it was done, but he failed to do this, and with full knowledge of the facts, took other risks upon the same property in other companies which he also represented. It was held that the condition was waived.

The difference between that class of cases and the one before us is, that in this case the written language of the policy defined and limited the power of the agent. He could not bind the company by taking risks on any property, unless that property was owned by the plaintiff, or held by it in trust, or on commission, or had been sold by it and not delivered. The plaintiff was bound to take notice of that limitation, and if it went beyond it in its dealings with the agent, it did so at its peril.

The judgment is affirmed.

## UNITED STATES CIRCUIT COURT.

DISTRICT OF OREGON.

DURHAM

vs.

FIRE &amp; MARINE INS. CO.\*

In a suit to reform a written instrument, it must be shown that the mistake is mutual; and therefore it must appear from the allegations of the bill, what the agreement of the parties was, and wherein the writing fails to embody it.

A bill brought to reform a policy of insurance, stated that the several owners of a certain warehouse, applied to the defendant for insurance against fire on their interests in said property, with loss, if any, payable to one of them; and that "thereupon" the defendant issued its policy on the interest of that one alone, instead of all: *Held*, On demurrer to the bill for want of equity, that it did not appear that the defendant ever agreed to insure the interest of but the one of the owners, and therefore it was not shown that the mistake was mutual.

Suit to reform a policy of insurance. The opinion states the facts.

GEORGE H. WILLIAMS, *for Plaintiff*, and the latter in propria persona.  
PAUL R. DEADY, *for Defendant*.

DEADY, J.

This suit is brought to reform a policy of insurance issued by the defendant on July 31, 1883, whereby it undertook to indemnify Theo. Liebe against loss by fire, for the period of one year from the date thereof, of his interest, not exceeding four thousand dollars in value, in a two-story, frame building, then in course of construction, and to be occupied as a grain warehouse, and known as the "Dayton Mills

\* Decision rendered, December 31, 1884. From *West Coast Reporter*.

warehouse," in Dayton, Oregon, for the premium of one hundred dollars in hand paid.

The bill alleges that on the day the policy was issued and prior thereto, William Burnell, Theo. H. Liebe, E. S. Larsen, Elizabeth Crane, and A. A. Crane were the owners of a certain parcel of real property, on which was situated a grist mill and the warehouse in question; that on said day, said Burnell, "on behalf of himself and co-owners, composing said Dayton Flouring Mills Company," applied to the agent of the defendant at Portland, for insurance "on a warehouse, then in process of construction by said company on their said lands," with loss, if any, payable to said Liebe; that thereupon "in consideration of the payment by the said insured" of the premium, the defendant by its agent issued the policy in question and "thereby undertook to insure the said Dayton Flouring Mills Company against loss or damage by fire, to the amount of four thousand dollars upon said warehouse;" that "by some oversight, misapprehension or mistake" on the part of the agent of the defendant, said policy was issued in the name of said Liebe, who in fact only owned one-fourth interest therein, instead of that of the Dayton Flouring Mills Company; and that the agent of the defendant "well knew the parties who composed the said Dayton Flouring Mills Company and well knew the said company and parties, instead of Liebe, owned said property."

It also appears from the bill that on November 27, 1883, the persons composing the said company, conveyed said property to the plaintiff, on December 3, 1883, with the consent of the defendant, "sold, assigned and conveyed" to the plaintiff "their interest in the said land and warehouse, and the said policy of insurance;" and that on January 17, 1884, said warehouse was totally destroyed by fire.

The insurance company declined to pay any more on the policy than the value of Liebe's interest in the property, claiming that by its terms they only agreed to indemnify the assured for the loss or injury to such interest therein, to wit: one-fourth of the same.

The defendant demurs to the bill for want of equity, because (1) it does not appear that the alleged mistake was mutual; and (2) either the plaintiff took the assignment without knowledge of the alleged mistake, and therefore has all he bargained for or expected—a policy on Liebe's interest in the property, whatever that may be—and there is no mistake as to the plaintiff, or he took the same with knowledge of the mistake and is guilty of laches in not sooner making it known and seeking a correction thereof.

Delay in bringing a suit or making a claim to have a written instrument reformed on the ground that it does not embody the contract of the parties, is not a technical bar to such suit, but is only a circumstance, tending to show, with more or less force, according to the nature of the transaction and the situation of the parties, that the plaintiff took the policy with knowledge of its contents and ought to be bound by them. But when it clearly appears from the bill, that the plaintiff has been guilty of laches, a demurrer thereto for that cause will be sustained.

This suit was brought on September 1, 1884—more than nine months after the policy was assigned to the plaintiff, and more than seven months after the loss occurred.

And no claim appears to have been made before this, by either the assignee or his assignors, that the instrument did not contain the contract of the parties. No excuse is offered for this delay, and when this fact is considered in the light of the presumption that the plaintiff's assignors took the policy with knowledge of its contents, probably it does appear that the parties have been guilty of laches in making and asserting the claim that the policy is erroneous.

But the fact may be otherwise, and I think it best to overrule the demurrer on this point, and reserve the question of laches until the final hearing. On the first alternative of the latter proposition, there has been no argument. It is not denied that the assignment of the policy—the subject-matter—to the plaintiff, carried with it the right to maintain any suit necessary or proper to establish or enforce the the apparent obligation of the defendant. And I am not prepared to say that such an assignment did not also carry with it the right to maintain a suit to reform the contract, even if the assignee was then unaware of the alleged mistake, and took the assignment without any special reference thereto. This matter is also reserved until the final hearing.

But on the first point the demurrer must be sustained.

A party seeking to have an instrument reformed, must show—as well by his pleading as in proof—in what the mistake consists, and that it is mutual. In other words, it must appear that the contract, as reduced to writing, does not contain what both parties intended it should. And to this end, it must be shown in what they did agree. A mistake in a contract, resulting from the misunderstanding of the parties, is not a ground for reforming it, although it may be for rescinding it. When each party is laboring under a misapprehension as to the purpose or intent of the other, their minds do not meet,

and there is no contract to reform: *Hearne vs. Marine Ins. Co.*, 20 Wall., 490; *Brugger vs. State Invest. Co.*, 5 Saw., 310; *Wood on Ins* 505.

The bill in this case does not allege that there was any express agreement between the parties on the subject of insuring this property. It is only stated that Burnell, for himself and co-owners, applied for insurance on the warehouse, with loss payable to Liebe. It is not even explicitly stated whose interest in the property Burnell applied for insurance on, or that he then disclosed the names of any of the owners except that of Liebe. But there is no sort of showing that the defendant accepted Burnell's application or agreed to insure the interest of any one in the warehouse. The allegation goes no farther than this—that "thereupon" the defendant issued a policy on the interest of Liebe in the property. But as what the defendant did is the only circumstance tending to show that it agreed to do anything, there is nothing to show that it agreed to do more than it did do—issue a policy on Liebe's interest in the property.

It is true that the bill alleges that the defendant, in issuing the policy, "thereby undertook to insure the Dayton Flouring Mills Company against loss or damage by fire, to the amount of four thousand dollars upon said warehouse," but that by some "misapprehension" of the defendant, said policy was issued in the name of Liebe instead of said company.

But a reference to the policy, which is made a part of the bill, shows that all the defendant undertook "thereby" to do, was to insure Liebe's interest in the property. What other interest, if any, the defendant may have agreed to insure by this policy, does not appear. The plaintiff seeks to have the policy reformed, so as to cover the interest of each of the joint owners of the property, and to entitle himself to this relief, he must show, by clear and explicit statement in his bill, that there was an agreement between the parties to that effect. And, in this connection, it may be well to suggest, that upon this matter the language of the bill is uncertain and inartificial.

Insurance is a contract with the owner of property or some interest therein to indemnify him against loss or damage by fire. Colloquially speaking, it is effected in his "name;" but in contemplation of law it is effected on his interest in the property, and cannot, therefore, be effected in the "name" of any one else. It may be done for the benefit of such owner or any third person whom he may designate.

The "Dayton Flouring Mills Company" is not the "name" of any

person, either natural or artificial. It can have no interest in this property, and an insurance in that "name" is an insurance in the name of no one. A conveyance to the "Dayton Flouring Mills Company" would be void for want of a grantee: 1 Wash. R. P., 422; 2 id., 565, 568; *Friedman vs. Goodwin*, 1 McC., 149.

The phrase is a mere arbitrary collocation of words, constituting a style or firm name, or sign, under which natural persons associated together as partners may do business.

But waiving this matter, and assuming that an application was duly made by or on behalf of the individual owners of the warehouse to insure their interests therein, it does not appear from the bill that the defendant ever agreed to insure such interests and issue a policy accordingly, but only that the defendant thereupon issued a policy covering the interest of Liebe alone. That this was the result of a mistake or misapprehension on the part of the defendant may be true, but for aught that appears, and so far as does appear, such mistake or misapprehension may have arisen from the fact that the defendants did not wholly accept or correctly apprehend the application of Burnell, rather than that it erred in reducing the contract to writing. And, if so, there was no mutual mistake in the matter. The minds of the parties never met on the proposition contained in the application. They made no contract other than the one which is implied in the issuing by the one and the acceptance by the other of the policy on the interest of Liebe alone.

The demurrer is sustained.

## COURT OF APPEALS OF KENTUCKY.

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*Appeal from Louisville Chancery Court.*

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VAN BIBBER'S ADM'R, ETC. }

vs. }

VAN BIBBER.\* }

A took out a policy in a benevolent insurance company, in which he designated his brother as the beneficiary. The brother died before A, *Held*, That upon A's death, the proceeds of the policy were not payable to the brother's personal representative or distributees, but to the widow of A.

B. W. DUKE, JNO. B. BASKIN, *for Appellant.*

WARD & McAFEE, *for Appellee.*

HOLT, J.

On November 5, 1879, O. Van Bibber became a member of the corporation known as the "Presbyterian Mutual Assurance Fund."

His application for membership directed that the "sum due at my death I desire to be paid to my brother, Harvey Van Bibber;" while the certificate of membership provided that the benefit, if not exceeding \$2,000, should, upon his death and the surrender of the certificate, be paid "to such person or persons as he may designate by will or upon the books of this corporation."

By an entry upon the company's books also, Harvey Van Bibber was designated as the beneficiary. He died on March 7, 1880.

On March 11, 1880, O. Van Bibber, by letter, requested the company to enter his wife's name upon its books as the beneficiary, and it did so, and furnished him a certificate of the fact. He died on May 26, 1880, intestate and childless.

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\* Opinion filed, December 11, 1884. From *Kentucky Law Reporter*.

The benefit is now claimed by his widow, E. L. Van Bibber, by the administrator of Harvey Van Bibber, and also by his sisters, he having died unmarried and intestate.

The said administrator also seeks, in the event he is not entitled to the entire fund, to recover so much of it as will pay what he alleges was owing his intestate by O. Van Bibber, upon the ground that the insurance had been effected to secure it and was in pledge for it.

The 4th section of the company's charter provides, "the object of this corporation is to create and provide a beneficiary fund for the families or relations of deceased members, or for the benefit of members in sickness."

The 6th section says:—

"Upon the decease of any member of this association, the fund to which his family is entitled, shall be paid as may be designated in the application for membership; this being changed by death, or otherwise impossible, it shall go,

First—to the widow and infant children.

Second—to his mother and sisters.

Third—to his father and brothers.

Fourth—to his grandchildren.

Fifth—to his legal heirs.

Section 7. "The fund due deceased members shall not be subject to the claims of creditors, and shall not be reached by attachment, garnishment, or other process of law, so as to divert from the family of such members."

The above are all the provisions of the charter that bear upon the questions presented by this appeal.

A beneficiary under an insurance policy, must have an insurable interest in the life of the insured. It is well settled, however, that a creditor has such an interest in the life of the debtor, while upon the other hand, a mere wager policy is void: *Bliss on L. Ins.*, sec. 27; *Conn. M. L. Ins. Co. vs. Schaefer*, 94 U. S., 457.

In this instance, however, there was no power to insure for the benefit of a creditor, or to pledge the policy to secure a debt.

The 7th section, *supra*, forbids it. The legislature created the corporation for purely benevolent purposes. The object in view was the benefit of the family of the deceased member, and it would be defeated if the insurance fund were liable for the debts of the insured.



It would be idle to permit a pledge of the policy when the contract could not be enforced, or to give a right and withhold the remedy: *Ky. Masonic Mut. L. Ins. Co. vs. William's Adm'r*, 13 Bush, 489.

It is, however, really unnecessary to discuss this question; or whether any debt was in fact owing or enforceable, or any pledge attempted; or whether the lower court ruled correctly upon the exceptions to the testimony, owing to the conclusion we have reached upon another question which is in advance, and is decisive of the case.

It is a general rule as to an ordinary life insurance policy, that the person originally designated in it as the beneficiary, is entitled to the benefit; that the right to it vests in him the moment it is issued, and that neither the insured or the insurer can change it to the detriment of this third party.

This rule applies to policies issued by mutual benefit associations, and must govern in this instance, unless the charter provides differently.

The certificate of membership constitutes the contract; but it is to be construed and governed by the company's charter.

In fact, it may be said that the charter is a part of the contract; and if it declares who in a certain event shall be the beneficiary, the parties cannot alter this legislative direction, because neither the company or the insured can do anything in violation of it.

It is necessary to keep in view, that it was certainly the main object of the legislature, if indeed it was not its sole one in this instance, to provide for the member of the company in case of his sickness or for his family in the event of his death.

This intention would therefore be defeated if a stranger could be named as the beneficiary, and the fund pass to his representatives upon his death.

It is, however, urged that in this instance the beneficiary was a brother, and that under the charter the "relations" of members might be provided for as well as their "families."

The 6th section of the charter, however, fixes to whom the benefit is to be paid. As showing the legislative intent, it first speaks of it as "the fund to which his (the member's) family is entitled."

It then provides that it shall be paid as may have been designated in the application for membership; but if this be impossible by reason of death or otherwise, it must be then paid to the persons and in the order as enumerated in the section. The death alluded to is certainly that of the designated beneficiary; and the language leads

irresistibly to the conclusion that it was intended that in order that the beneficiary might take, he must be a living person at the time of the death of the insured.

The words "this being changed by death" certainly mean something; and if the benefit goes to the representatives of the decedent, who was named as the beneficiary, they were needless, as the fund would have so passed without them.

It is urged, however, that the persons named in said section, who take in the event of the death of the beneficiary, are his wife and his relations, and not those of the insured.

It is hardly to be supposed that the law-making power would have so carefully enumerated the persons, who were to take in the event of the death of the beneficiary, if it was intended that the fund should pass to his line; while upon the other hand this is entirely natural and reasonable if it was intended that it should go to the line of the insured. This conclusion is fortified by the fact that by the order of payment named those persons who were first entitled to the regard of the insured and who were most likely to need aid were first named.

For instance, the sisters take in preference to the brothers; and this particularity would not exist if the fund had to pass to the representatives of the beneficiary, who was not a member of the association.

The death of the beneficiary "changed" the designation of the fund; and then the charter gave it "as a benefit" to those who depended for their support upon the life of the member for whose benefit the law was enacted.

The assured had the power to designate a relative and creditor as the beneficiary; but as he died before the death of the insured, the designation was "changed by death," and the fund could not be paid as designated in the application for membership; in which event it passed to the widow of the party intended by the charter to be benefited.

It is unnecessary to decide whether the insured had the power to name another beneficiary after the death of the one named in the application for membership, as the one he did name is the same person who was first entitled to the fund under the company's charter in the event of the death of the beneficiary named in the certificate of membership.

Judgment affirmed.

## SUPREME COURT COMMISSION OF OHIO.

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*Error to the District of Hamilton County.*

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W. A. LOWE

vs.

UNION CENTRAL LIFE INS. CO. )

The Ohio statutes deprive foreign companies of the right to set up untrue statements as to age, but leave Ohio companies in full possession of such right.

D. THEW WRIGHT, and CHAMPION & WILLIAMS, *for Plaintiff in Error.*

Premising that this is a suit to recover back premiums already paid, and paid under a mistake, and not a suit to recover for a loss on the policy, plaintiff in error states four propositions:—

*First.* It is not a sufficient defense to show simply that a statement in the application was incorrect; something more must be shown. It must be shown that plaintiff was responsible for that mistake. Hence charge two was asked.

*Second.* That, by a fair construction of the policy and application, a mere mistake, if plaintiff is responsible for it, does not vitiate the contract of insurance, unless it is shown that such mistake was willful, intentional, or fraudulent; that a simple, honest mistake is not fatal to our right of recovery, even if we made it.

*Third.* If the policy is void, by reason of mistake in the age of applicant, and the mistake was without fraud, the premiums may be recovered back.

*Fourth.* The statute prevents the defense herein set up from being set up, in a suit for loss on the policy, and it was the duty of the company to accept the tendered premiums, and renew the policy. Refusing this, we had the right to rescind the contract of insurance, and recover the premiums paid.

*RAMSEY & MATHEWS, for Defendant in Error.*

Apart from the Ohio statute, in that form of contract in which the application, although referred to in the policy, is not made a part of it, and is not, therefore, a warranty, the law is well settled that the statements are thereby made material, and that the innocence of the misrepresentation will not prevent the forfeiture: *Campbell vs. N. E. Ins. Co.*, 98 Mass., 381; *Cheever vs. Ins. Co.*, 5 Bigelow, 458, and cases cited.

But the statements in this application are express warranties.

The proviso relied upon does not apply to Ohio companies.

The act of April 27th, 1872 (69 O. L., 160), contains the first appearance of legislation upon the subject in Ohio. That act is a general act, relating to all companies doing business in Ohio. Section 32 is as follows:—

“Sec. 32. All life insurance companies, after having received at least three annual premiums, on any policy issued on the life of any person in the State, are hereby estopped from defending against any claim arising upon such policy by reason of any errors, omissions or misstatements of the assured in any application made by such assured on which said policy was issued, except as to age or fraud.”

This section is still in full force. It is reproduced in section 3,626, Revised Statutes.

Section 18 of this act (p. 155), relates entirely to companies “organized by act of Congress, or by or under the laws of any other State of the United States.” The section regulates the business in Ohio of such foreign corporations, and prescribes the conditions upon which such business may be done.

Thus the law of 1872 permitted all companies to defend upon the ground of misstatement as to “age or fraud,” at any time, and upon any misstatement until three annual premiums had been received.

The act of April 2, 1873 (70 O. L., 97) is entitled: “An act to amend section 18 of chapter 2,” of the act April 27th, 1872. It provides for the issuance of a certificate of authority to foreign companies to do business in this State, etc.; for service of summons by mail upon such companies after their withdrawal from the State, etc.;

for the investments which must be made by such companies, and a deposit of securities, etc., etc.

Then follow two provisos: *First*. That so long as the company remains solvent, it may collect interest upon such securities. *Second*. "Provided, that no answer or answers, etc., made by any applicant in his or her application for a life policy, shall bar the right to recover upon any policy issued upon such application," etc.

This provision is reproduced in the Revised Statutes as section 3,625. It was in force at the date of the policy in question, to wit, June 15th 1876.

The act of May 15th, 1878 (75 O. L., 572), also relates entirely to foreign companies. It amends section 20 of the act of April 27th, 1872, and section 18 of that act, as amended May 2d, 1873.

The intention of the law-maker must be deduced from the whole enactment, and the sections must be construed consistently if possible. The provisos in section 18 are limitations simply upon the rights of foreign companies. If applied to Ohio companies, it would repeal section 32.

That the two sections are absolutely inconsistent, if our construction be incorrect, is clear. The act of 1872 permits the defense for three years; after three years it is permitted as to age. The act of 1873 forbids it, ab initio, as to all misstatements. It is clear, notwithstanding this fact, that the legislature at all times intended to leave section 32 in full force. This is plain, from the fact that the act of 1873 is a repeal and amendment of section 18 alone, and the act of 1878 amends only sections 18 and 20. And the preservation of section 32 in the Revised Statutes removes all doubt upon the subject. Hence, it is necessary to construe the act of 1872.

1. A mere revision will not be held to effect a change in the law, unless the intention to make such change is clear: *State vs. Comrs. Shelby Co.*, 36 O. S., 326; *State vs. Jackson*, 36 O. S., 286.

2. If the Legislature intended to enact section 3,625, as an independent provision upon the subject to which it relates, and it therefore became at the date of the revision applicable to all companies, then section 3,626 (assuming the presence of direct inconsistency between the two sections) must be construed to be a modification of section 3,625, because it occurs later in the statutes.

The act relates to misstatements and not to warranties, being in derogation of common right, it must be strictly construed.

The action is not brought on the policy, therefore the statute does not apply.

BY THE COURT.

The petition charged that by policy dated June 30, 1876, defendant insured the life of L.'s father for the benefit of L.; that L. had duly paid four annual premiums, of \$209.46 each, and tendered a fifth at proper time and place; that defendant wrongfully refused to accept it; that L. thereupon gave notice that he rescinded the contract and demanded payment of the four premiums and interest, which defendant refused to pay. The answer averred that the policy contained a stipulation and condition that unless all the statements made in the application for the same were true, the said policy should be void, and all payment of premiums made thereon should be forfeited to the defendant, and the application for the policy contained a statement that Michael Lowe, the person whose life was covered by the terms of said policy, was fifty-eight (58) years of age at the date of said policy, when in truth he was several years older than the age fixed by said statement.

There was no reply. The only evidence offered at the trial was the policy. After verdict for defendant, L. moved for judgment on the pleadings notwithstanding the verdict. This the court refused and rendered judgment.

*Held*, The last "proviso" in section 18, chap. 2, of the Insurance Act passed April 27, 1872, as amended by the act of April 2, 1873 (70 O. L., 99), did not repeal section 32 of said chapter and act. (69 O. L. 160.) The words in the act of 1873, conflicting with said section 32, modified the terms on which the right to do business in Ohio was granted to companies of other States. While they deprive foreign companies of the right to set up an untrue statement as to age, it left section 32 in full force as to Ohio Companies.

Judgment affirmed.

## UNITED STATES CIRCUIT COURT, E. D. OF MISSOURI

HUNT

vs.

MERCANTILE INS. CO.\*

Insurance taken out by a husband in his own name upon sole and separate property of his wife, is to be presumed to have been procured by him as her agent and for her benefit.

Where a company's policies provide that "any interest in property insured not absolute, or that is less than a perfect title, must be especially represented to the company and expressed in this policy in writing, otherwise the insurance shall be void," it is the duty of the agent who makes the contract in behalf of the company, if he knows that the property upon which insurance is desired belongs to the applicant's wife, to state that fact in the policy, and if he fails to do so, the policy will not be invalid on that account.

A husband who has taken out insurance as his wife's agent upon her property in his own name may sue in his own name for her benefit in case of loss.

Where a husband insured property in his own name, part of which belonged to him and part to his wife, and after a loss a creditor of his obtained judgment against him and garnished the insurance company and obtained judgment for the amount of the husband's loss, *held*, That the judgment in the garnishment proceedings did not estop the husband from suing the company in his own name for the amount due his wife.

HIRAM J. GROVER, *for Plaintiff.*

KRUM & JONES, *for Defendant.*

At Law.

Suit upon a policy of insurance, taken out by the plaintiff in his own name, upon a building and contents. The contents belonged to the plaintiff, but the building was the sole and separate estate of

\* Decision rendered, November 17, 1884. From *Federal Reporter*.

his wife. Building and contents having been destroyed by fire, this suit was brought to recover \$500, the amount of insurance upon the former. The defendant sets up as matters of defense :—

(1.) That said building was used at the time it was insured as a tobacco manufactory, and was insured as such ; that said policy provides that if any building therein described should become vacant or unoccupied for the purpose indicated in the policy, then the policy should become void, unless consent in writing should be indorsed by the insurer upon said policy ; and that without any such consent being given said property was allowed to remain vacant and unused for the purposes indicated in the policy for the period of thirty days prior to its destruction by fire. (2.) That said building was the sole and separate property of plaintiff's wife, and that fact not having been expressed in the policy as therein required, the policy was on that account void. (3.) That subsequent to said loss the Mercantile National Bank had recovered a judgment in this court against plaintiff for the sum of \$7,469.60, and had execution issued, and summoned the defendant herein as garnishee ; that defendant duly answered the interrogatories filed in said proceedings, denying any indebtedness to plaintiff, and alleging in its said answer the same facts as defenses for non-indebtedness to the plaintiff herein upon said policy as are pleaded in this suit ; that the same issues were made up in said garnishment proceedings, on a denial of said answer, and the reply to said denial, that are presented in this suit, and upon a trial of said issues, the plaintiff herein, being a party, cross-examined the witnesses introduced, and that the court determined all of said issues in favor of defendant, except as to \$500, the amount of insurance mentioned in said policy of insurance as being upon the personal property described therein, which amount of money the court determined to be in the hands of defendant as garnishee, and to be due plaintiff ; that said sum was paid to said bank ; and that, by reason of the premises, the plaintiff herein has no further cause of action, because the issues in reference to such other claim and demand have all been determined by this court in favor of defendant, and are *res adjudicata*.

The plaintiff, by his reply, admits that said building belonged to his wife, but alleges that the insurance thereon, though taken out in his name, was so taken out by him as her authorized agent, and for her benefit, and that said insurance company knew that said property belonged to plaintiff's wife, and that he was acting as her agent in obtaining said insurance when it issued its policy ; and that it



was the duty of said company's agent, and not of plaintiff, to see to the expression of the true ownership of said property in said policy.

The reply closed with a general denial of the averments of the answer not expressly admitted.

The case was tried by the court without a jury.

Evidence was introduced at the trial tending to prove that plaintiff acted as his wife's agent in taking out said policy on said building, and that defendant's agent, who issued the policy, knew at the time the contract of insurance was made, that said building belonged to the plaintiff's wife, he having, as the agent of another company, previously issued a policy upon the same property in the wife's name, and that he thereafter renewed both policies,—one in the wife's name, and the other in the name of the husband.

On November 1, 1884, the court delivered the following opinion:—

TREAT, J.

There are three contested points in this case: *First*, whether the building was destroyed by fire during non-occupancy, within the meaning of the policy. Without analyzing the testimony it must suffice to state that under the facts the loss was not avoided by the then condition of the premises. *Second*, the defendant relies upon the following condition in the policy, to wit: "Any interest in property insured not absolute, or that is less than a perfect title, or in case of a building standing on leased ground, or on land held under contract only, must be especially represented to the company, and expressed in this policy in writing, otherwise the insurance shall be void." If it were necessary to determine the questions connected with this allegation in the light of the dealings between the parties, and the knowledge of defendant of the relationship of the assured to the property, important questions would have to be determined. The briefs of the counsel are mainly directed to this proposition. *Third*, a partial payment and estoppel by a prior adjudication are not controverted by the pleadings. The court has examined the pleadings and record, and reached the conclusion that the plaintiff is estopped, as the answer avers. See *Cromwell vs. County of Sac*, 94 U. S., 351. Judgment is therefore ordered for the defendant.

The plaintiff thereupon move for a new trial upon the ground that "the facts pleaded by defendant in its answer as an estoppel upon plaintiff were controverted by the plaintiff's reply to said answer, and defendant offered no evidence at the trial to prove said

facts," and that the plea of estoppel had been abandoned by the defendant, and the evidence did not sustain the judgment. In his brief, the plaintiff called the court's attention to the fact that in the proceedings in the case of *Merchants' National Bank vs. Mercantile Insurance Co.*, the court had found that the defendant herein was liable for the amount written upon the personalty covered by the property, viz., \$500, but had held that a creditor of the plaintiff herein could not recover the \$500 written upon the realty, because the latter fund did not belong to the plaintiff, but to his wife, if any one, and could only be recovered, if at all, in a suit for her benefit, and that this suit had been instituted by plaintiff for the benefit of his wife.

The motion for a new trial having been argued, the court (per *TREAT, J.*) reversed its former ruling in favor of the defendant, and held for the plaintiff upon all the three points mentioned in its former opinion, and gave judgment accordingly.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Mercer County.*

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SMITH

vs.

MERCER COUNTY MUT. FIRE INS. CO.,  
BELL, RECEIVER.\*

It is an established rule that the statute of limitations is no bar to an action brought within six years of the date when the claim became suable.

Where the liability of the member of a mutual insurance company is to pay, after assessment and notice, his proportion of losses and expenses occurring during his membership, the right of action against him does not accrue till after assessment and notice.

If suit be brought within six years after the assessment and notice, though more than six years after termination of the membership, the statute will not bar.

J. G. ELLIOTT, Esq., for Plaintiff in Error.

E. W. JACKSON, Esq., Contra.

TRUNKY, J.

The defendant concedes that he was not bound for any certain sum of money, that his liability was conditional, and that no action accrued against him until an assessment made in accordance with the charter of the company. He contends that the plaintiff was bound to levy all assessments for losses and expenses which occurred

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\* Opinion filed, November 10, 1884. From *Pittsburgh Legal Journal*.

during his membership, within six years from the expiration thereof, and that he may avail the bar of the statute of limitations against any assessment made more than six years after the policy had expired. Thus, the single question is presented whether, upon contracts of the nature of the one in suit, the statute begins to run before an action has accrued.

Where a man contracts to pay another a sum of money on demand, he may be sued immediately, the suit itself being a sufficient demand. But if the defendant's liability depends on the performance of a condition, until it be performed, no action will lie. When a note is given to a mutual insurance company to stand in place of capital, and the time for requiring payment is left to the uncontrollable will of the company, it is payable on demand, and the statute bars a suit commenced more than six years after date of the note: *Howland vs. Edmonds*, 24 N. Y., 307. In that case the difference was defined between the note in suit and a note given to a mutual insurance company for a policy, as an engagement to pay the proportion of the losses, not exceeding the nominal amount of the note; no action being maintainable on the latter until after an assessment to ascertain the proportion. It was vain to note the difference, or to inquire when an action would accrue, unless the statute would not begin to run until there would be a right to begin suit.

Where subscription was made to the capital stock of a corporation, payable in such proportion and at such times as should be determined by the president and managers, the charter providing that, if any proportion be not paid within thirty days after notice, the company may bring suit therefor, it was decided that no action was maintainable until the proportion and time for payment had been determined and the requisite notice given, and, therefore, the statute of limitation did not begin to run until the plaintiff had a right to sue: *Sinkler vs. Turnpike Co.*, 3 P. & W., 149. Subscribers to capital, upon payment of twenty per centum on their shares, agreed with the corporation that no further assessment should be made thereon, and certificates for full-paid shares were issued to them. The corporation was adjudicated a bankrupt, and to satisfy the claims of its creditors it became necessary to assess the unpaid stock. It was held that the agreement, though binding the parties, was void as to creditors of the corporation; that before the assignees in bankruptcy could maintain an action against the stockholder, there must be some proceeding in the proper

court in the interest of the creditors ; and until ordered by such court, an assessment, or an authorized demand upon the stockholder, no cause of action accrues against him by the assignees, and the limitation provided in the Bankrupt Act does not begin to run: *Scovil vs. Thayer*, 105 U. S., 143.

The doctrine of the foregoing cases is not only applicable to an agreement by the insured to pay his proportion of the losses and expenses to the insurer, but it has been enforced in other States where the question has arisen. A sufficient answer to the plea of the statute of limitations is, that the note was not payable at once, or on demand, but is payable by installments, upon the happening of a loss and assessment therefor ; and so, until an assessment is made, the statute does not begin to run. In the matter of *Slater Mutual Fire Ins. Co.*, 10 Rhode Island, 42 ; *Bigelow et al. vs. Libby*, 117 Mass., 359. The same principle was ruled, though the action was not on a premium note, in *Hope Mutual Life Ins. Co. vs. Weed*, 28 Conn., 51. In New York it was decided by the supreme court, that the liability of the maker of a premium note given to a mutual insurance company, payable "in such portions and at such times as the directors may agreeably to their charter and by-laws require," is not absolute but conditional ; and the cause of action is not perfect until an assessment, and notice thereof given to the maker, and an action thereon will not be barred by the statute of limitation until six years from that time: *Howland, Receiver, vs. Cuykendall*, 40 Barb., 320. This decision was not by the court of appeals, but it seems to have been accepted as sound.

To repel the current of authority, the defendant referred to *Laforge vs. Jayne*, 9 Pa. St., 412 ; *Pittsburgh & Connellsville Railroad Co. vs. Byers*, 32 id., 22 ; *Morrison's Adm'r vs. Mullen*, 34 id., 12. and *Codman vs. Rogers*, 10 Pick., 112. It is only necessary to refer to *Girard Bank vs. Bank of Penn Township*, 39 Pa. St., 92, to learn how inapplicable those cases are to cases "between an ordinary debtor and creditor, or depositor and depository, or bailor and bailee for custody," or, it may be added, between insured and insurer in an action on a conditional premium contract. In *Finkbone's Appeal*, 86 Pa. St., 368, *Laforge vs. Jayne* is mentioned as overruled. *Codman vs. Rogers* was no authority against the adjudication in *Bigelow et al. vs. Libby*, for the principle involved in the former case did not touch the latter. Lapse of time with other circumstances may sometimes be sufficient to warrant an inference of payment, or the abandonment of a contract, or to induce a chan-

cellor to dismiss a bill because the plaintiff's claim is stale and inequitable ; but such cases do not overthrow the established rule, that the statute of limitations is no bar to an action brought within six years of the date when the claim became suable. To hold that the statute is a bar to the plaintiff's claim on the ground that demand should have been within six years, would be equivalent to converting this conditional contract, dependent on the happening of losses, into an absolute contract to pay a certain sum on demand.

Judgment affirmed.

CIRCUIT COURT OF THE UNITED STATES,  
DISTRICT OF RHODE ISLAND.

OWEN MEALEY

vs.

METROPOLITAN LIFE INS. CO.\*

The defendant company cannot be compelled to file the application and medical examination in the office of the clerk of court.

W. F. ANGELL and C. BRADLEY *for Plaintiff.*

W. G. ROELKER, *for Defendant.*

CARPENTER, J.

This is an action on a policy of life insurance, and the defendant files several pleas setting out that the statements and answers to certain questions contained in the application and medical examination which form part of the contract of insurance are untrue, and specifying the particular statements so alleged to be untrue, and making profert of the application and medical examination. The plaintiff now moves for an order on the defendant to file the application and medical examination in the clerks office.

The motion is not properly framed as a demand of oyer, since the order granting oyer, would provide only that the plaintiff have a copy of the instrument and not that the original instrument be put on file. The motion has, however, been argued as though it were a proper demand of oyer, and in that light, I have considered it.

In the first place it is to be noted that the plea does not show that

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\* Decision rendered, Feb. 26, 1885.

the agreement is under seal and consequently profert was unnecessary and oyer cannot be demanded.

The authorities cited by the defendant abundantly sustain this position, 1 Chitty on Pleading, \*430, \*431; Sneed vs. Wister, 8 Wheat., 690. Indeed, the order here asked, seems to be prohibited by implied exclusion by the twenty-third law rule for this circuit, which reads as follows :—

“Oyer of all specialties declared on may be had on motion at the return term, but not afterwards, unless by special order of courts on affidavit of special cause.”

It was, however, the practice of the English courts and is the practice with us, in cases where oyer is not demandable, but in which the court can see that a knowledge of the instrument in question is proper and necessary for either party, to make an order that he have a copy. But in the practice of the courts of Rhode Island, which is followed by this court, the proceeding to be taken in order to obtain an order of this kind is prescribed by the law of the State in Pub. Stat., cap 214, sec. 45; which is as follows :—

“Whenever either party to any proceeding at law or equity in the supreme court or to any proceeding at law in the court of common pleas, shall set forth in writing under oath, upon his knowledge or belief, that opposite party is in the possession or control of some document to which the applicant is entitled, such court or a justice may order such opposite party, or if the same be a body corporate then some officer thereof, to make answer on oath at or before a time to be fixed in said order, as to what document he so has relating to the matter in dispute between the parties, or what he knows as to the custody of such document, and if in his possession or control whether he objects to the production of the same, and the grounds of such objection, and thereupon such court or justice may require the production of said document, or may compel the party having the same in his possession or control to allow the applicant to inspect the same, and if necessary, to take examined copies of the same, and may make such further order thereon as shall be just.”

This present motion is not framed in accordance with the statute, and it must be dismissed.



## SUPREME COURT OF MICHIGAN.

FREY

vs.

GERMANIA LIFE INS. CO.\*

Any clause in a policy of life insurance should be construed somewhat strictly, but parties may stipulate what risks shall be covered by the policy, and if the terms are not ambiguous they will be enforced.

There is nothing in the laws of Michigan which forbids a life insurance company paying (under the terms of its policies) the beneficiary of a policy-holder who has taken his own life, a "reserved sum," which virtually refunds the premiums paid instead of the amount of the policy.

The fact that the policy does not declare what the reserved sum shall be, does not render the clause referring to it void, provided it is ascertainable.

Case made from Kent.

D. E. CORBETT, *for Plaintiff and Appellant.*

R. W. BUTTERFIELD, *for Defendant.*

CAMPBELL, J.

Plaintiff sued defendant on a life insurance policy upon the life of her husband, Adam Frey, who committed suicide while of unsound mind. The only question in the case is whether this, under the terms of the policy, defeated her right of recovery for any more than the amount allowed as legal reserve. The court below confined the recovery to that amount. The sum insured was \$1,000, but the reserve amounted to \$201.38. The policy, after other recitals and provisions, contained several clauses declaring under what circumstances it should be avoided. Among these was the following: "If the person aforesaid shall die by suicide, or by his own hand,

\* Opinion filed, January 21, 1886. From *N. W. Reporter*.

or in consequence of an attempt to commit suicide or to take his own life : provided, however, that if any of these acts be committed while in a condition of mental derangement or insanity, the company agreed to pay, upon the return of the policy thus avoided, the full legal reserve thereof."

It was stipulated on trial that Frey's death was by suicide while in a state of mental derangement or insanity, and that the reserve was the sum before referred to, which was paid into court, with costs. It was not urged on the argument that it was beyond the legal power of insurance policies, which should not cover death by suicide during insanity. It is unquestionably true that any clause involving forfeiture should be construed somewhat strictly. But it seems generally conceded that parties may stipulate what risks shall be covered by the policy, and if the terms of the instrument are not ambiguous they will be enforced. We do not discover any difficulty in ascertaining the meaning of this policy. It very plainly excepts every kind of suicide from the full protection of the insurance, and in favor of insane persons secures to their beneficiaries a smaller amount, which appears to be intended to restore in whole or in part the premiums paid. It does not differ in principle from provisions which should exclude from benefits death by particular diseases or accidents, which may involve no fault on the part of the decedent, but which may be a risk the company prefers not to take. This can, no doubt, be done where there is no legal provision to the contrary. Nothing in our insurance laws has been pointed out which forbids it. The fact that the policy does not declare what this reserved sum shall be, does not render the clause void, provided it is ascertainable. We are not informed what rule is applied for ascertaining it, but the parties have agreed what it should be, and therefore we must assume there are means of ascertainment. There was no error in the conclusion of the court below, and the judgment must be affirmed.

The other justices concur.

## LOWER COURT DECISIONS.

### TITLE TO WIFE'S POLICY.—RIGHTS OF CREDITORS.—INTERPLEADER.

*Supreme Court of New York.—General Term.*

PHILLIPENA KELLER, *Appellant*,

*vs.*

NEW ENGLAND MUT. LIFE INS. CO.\*

An endowment policy payable to the insured was for the benefit of the wife in case of prior decease of insured. Afterwards insured assigned all his property for the benefit of creditors, and died before the policy matured, leaving the wife surviving.

*Held*, That in a contest between the widow, administrator, and assignee, the case was a proper one for interpleader, and section 820 of the N. Y. code is not applicable.

The policy provided that it should be governed and construed by the laws of Massachusetts.

*Held*, That in such a contest as this the laws of New York, the domicile of the parties, must apply.

*Held*, That the premiums, not having been paid in fraud of creditors and part 5 title 1. art. 6, chap. 8, sect. 89 of N. Y. Rev. St. not applying, the widow was entitled to the fund.

Appeal from order of the special term granting injunction pendente lite.

MERRITT E. SAWYER, *for Appellant*.

ROGER FOSTER, *for Respondent*.

DAVIS, P. J.

This is an action in the nature of an interpleader, brought to compel three different claimants in interest to the money or portion

\* Impleaded with Hugh N. Camp, administrator etc., and William H. Buxton, assignee etc.

thereof payable on a policy of life insurance issued by the plaintiff to interplead, and praying an injunction to restrain them from suing the plaintiff, and also to restrain the defendant Keller from continuing an action to recover the proceeds of the policy previously brought by her in the superior court.

The facts are substantially these : On or about the 5th of April, 1881, the plaintiff issued a policy to G. F. Keller, since deceased, whereby, in consideration of the premium paid and to be paid, the company promised and agreed to pay to him \$5,000 at the end of eleven years from the date of the policy, or, if he should die before that date, to his executors or administrators in sixty days after satisfactory proof of his death. The policy was declared, in case of his prior decease, to be for the benefit of his wife, Phillipena Keller, if she shall survive him. G. F. Keller died on the 22d of February, 1884, having kept up the payment of the premiums on the policy. He left the defendant, Phillipena Keller, his widow, surviving him. On the 22d of May, 1884, the defendant Camp was duly appointed temporary administrator of the estate of George F. Keller, and duly qualified, and letters of administration were issued to him. Prior to his death, and on or about the 18th of January, 1884, Keller made an assignment of all his property to the defendant William H. Buxton for the benefit of his creditors. On the 24th of May, 1884, Mrs. Keller, the widow, brought an action, in the Superior Court of the City of New York, against the plaintiff, upon such policy, to recover the sum of \$5,000 and interest, claiming to be entitled to the whole thereof. The defendant Camp, as temporary administrator, claims to be entitled to receive \$2,500 of the amount payable on such policy, as assignee of said George F. Keller for the benefit of his creditors, on the ground that the amount of premiums paid by Keller on his life policy exceeded the limitation imposed by statute, and that the excess of such premiums belongs to his creditors. This action was therefore commenced for the purpose of bringing these several parties into court to contest their respective rights, the plaintiff being ready and willing to pay over the amount due on the policy to whomever shall be adjudged entitled to it, and bringing the same into court for that purpose in this court.

Upon the facts, this case seems to be a proper one for an interpleader. But it is insisted that the proper remedy was under section 820 of the code, which provides that a defendant "may at any time before answer upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt

or property without collusion with him, apply to the court upon notice to that person and the adverse party for an order to substitute that person in his place and to discharge him from liability to either, on his paying into court the amount of the debt." The court was of opinion that the plaintiff herein had not an adequate remedy under that section, and we think that opinion is well founded. Here are two claimants beside the widow ; one as the administrator of the estate, and the other as an assignee for the benefit of creditors, and their claims are not alike, the administrator claiming the whole sum and the assignee but a part of the money, and the case is not one covered by the strict letter of section 820, because the assignee of the deceased policy-holder does not claim or assert a demand for the same debt for which the action is brought. Even if it would bear a construction that would admit the bringing in of both these claimants as defendants in that action, nevertheless the facts in the case present a different contest than that contemplated by the section. Here is not only a contest between the plaintiff, the widow, and these two claimants, but one between the claimants themselves, which must also be litigated before the rights of all parties can be fully determined. As, for instance, if the administrator is held to have a superior right to the widow, he is still subject to a litigation between himself and the assignee to determine whether the assignee is not entitled to the sum he claims out of the proceeds of the policy. That contest could not be carried on under section 820, and therefore the rights of all the parties in respect of the money could not in a contingency which may arise, be disposed of in the action in the superior court.

We think the order was correct and should be affirmed, with \$10 costs and disbursements.

#### SUBSEQUENT ADJUDICATION UPON THE MERITS OF THE ACTION.

At the trial of the action before Judge Donohue at special term, it appeared that at the time of the commencement of the action by the widow against the insurance company in the Superior Court of the City of New York, no claim had been made by either the temporary administrator or the assignee ; that the counsel for the insurance company, seeing that each of them had a color of title to the payment of the whole or a part of the proceeds of the policy, visited both of them and asked of each, after stating to them the facts, whether he claimed any interest in the policy or would consent to its payment to the widow, and that thereupon the temporary adminis-

trator demanded payment of the whole to him, but the assignee refused to either claim or disclaim.

The counsel for the widow moved to dismiss the complaint upon the following grounds :—

I. That the plaintiff has brought this action through collusion with the defendants Camp and Buxton.

II. That this action is unnecessary inasmuch as complete relief might have been obtained by the plaintiff in the action brought by Mrs. Keller against it.

III. That no claim was made by the assignee.

IV. That there is no privity of claim between the parties.

The defendant Buxton joined in the second only of those grounds. The defendant Camp moved to dismiss upon a fifth ground :—

V. That the policy by its terms is payable to the personal representatives, and therefore there is no substantial claim on behalf of any one else under the terms of the policy.

ROGER FOSTER, *for Plaintiff.*

Fenn vs. Edwards, 5 Hare, 314, is on all fours with the case at bar and is conclusive in favor of the plaintiff.

There was no collusion. Citing, amongst other authorities, *Brassey vs. N. Y. & N. E. R. R. Co.*, 19 Fed. R., 663, and the lexical definitions of collusion.

To entitle the plaintiff, a mutual life insurance company, to bring this action, a specific claim or demand from each defendant was not necessary, provided each had a color of title: *Duke of Bolton vs. Williams*, 2 Vesey, Jr., 138, 153; *East India Co. vs. Edwards*, 18 Vesey, 376; *Wait's Practice*, vol. I., p. 173; *Almet vs. Britton*, 2 Eliz. larg. p. 65; *Herndon vs. Higgs*, 15 Arkansas, 389; *Fowler vs. Doyle*, 16 Iowa, 534, 537; *Sturns vs. Warren*, 101 Mass., 564; *Breede vs. Aster*, 2 Vernon, 37; *N. Y. & N. H. R. R. Co. vs. Schuyler*, 17 N. Y., 592. The plaintiff would not have obtained relief in the action in the superior court.

Even could the plaintiff have obtained relief in that action, this one could still be successfully maintained: *Wood vs. Swift*, 81 N. Y., 31, 35; *Barry vs. Mutual Life Ins. Co.*, 53 N. Y., 536; *Washington Life Ins. Co. vs. Lawrence*, 28 How. Pr., 435; *Board of Education vs. Scoville*, 13 Kansas, 17, 30; *Prudential Assurance Co. vs. Thomas*, L. R., 3 ch., App., 74, 77; *School District vs. Weston*, 31 Mich., 86;

Wait's Practice, vol. I. p. 174; Pomeroy's Equity Jurisprudence, vol. III. § 1,329. The questions of law and fact are sufficiently doubtful to authorize the maintenance of an action in the nature of an interpleader: *Mutual Life Ins. Co. vs. Blaiice*, N. Y. Daily Register, Dec. 27th, 1881; s. c. on appeal, 26 Haw., 473.

MERRITT E. SAWYER, for *Defendant Keller*, cited the following authorities, amongst others, in support of his motion to dismiss. There is no privity between the claimants: *Lund vs. Bank*, 23 How. Pr., 258; Pomeroy's Eq. Jur., §§ 1,324 and 1,326; Story's Eq. Pl., §§ 293-294. The claims in opposition to the widow were two frivolous to have merited consideration: *Mohawk Bank vs. Clute*, 4 Paige, 392; *Long vs. Cranberry*, 2 Tenn., Ch. 82. Relief might have been obtained under section 820 of the Code of Civil Procedure; *Wilson vs. Duncan*, 8 Abb. Pr. 354.

A. H. AMMIDOWN, appeared for *Defendant Camp*.

C. A. FLAMMER, for *Defendant Buxton*.

Judge Donohue filed no opinion; but, in a memorandum since lost, said that, although he originally inclined the other way, in deference to the opinion of the general term, he felt constrained to direct judgment for the plaintiff.

A reference to determine the conflicting claims of the defendants was then ordered. The policy contained the following clause: "This policy is payable only at the office of the company in Boston, from which it is issued, and this contract shall be governed and construed by the laws of Massachusetts." The Supreme Court of Massachusetts had held in *Bailey vs. New England Mutual Life Ins. Co.*, 114 Mass., 177, that the personal representative alone has the right to sue upon and collect a policy payable to a man's administrator for the benefit of another.

The statutes of Massachusetts (L. 1864, ch. 197) contain the following provision: "A policy of insurance on the life of any person, duly assigned, transferred or made payable to any married woman or to any person in trust for her or for her benefit, whether such transfer be made by her husband or other person, shall inure to her benefit and that of her children independently of her husband or his creditors, or of the persons effecting or transferring the same or his creditors, provided, however, that if the premium on such policy is paid by any person with intent to defraud his creditors, an amount

equal to the premium so paid, with interest thereon, shall inure to the benefit of said creditors, subject, however, to the Statute of Limitations."

The provision of the New York statutes upon the subject (L. 1858, ch. 187) is as follows: "But when the premium paid in any year out of the property or funds of the husband shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors." It is to be observed that the provision as to the excess over five hundred dollars is not confined by its language to cases of fraud. Whether or not the courts would give it a more narrow construction has never been decided.

#### PROCEEDINGS BEFORE THE REFEREE.

MERRITT E. SAWYER, for the Widow Keller, argued :—

The whole amount of the policy was payable directly to her: *Hoyle vs. Guardian Life Ins. Co.*, 6 Rob., 567; *Pitney vs. Glens Falls Ins. Co.*, 65 N. Y., 6; Code of Civil Procedure, § 449.

The Massachusetts statutes and decisions do not apply.

The New York statute does not apply to a policy such as the one in suit. *Barker vs. Union Mutual Life Ins. Co.*, 33 N. Y., 283, 287.

A. H. AMMIDOWN, for Defendant Camp :—

The administrator alone has the right to sue. 47 N. Y., 430; *Bailey vs. N. Y. Mut. Ins. Co.*, 114 Mass. 177. The Massachusetts statutes and decisions should govern. The assignment to Buxton is void, on account of a defect in its acknowledgment.

C. A. FLAMMER, for Defendant Buxton.

The assignment is valid. The New York statute should apply. There were several similar policies upon Keller's life, some of which have been collected by the widow. The representative of his creditors is entitled to recover the excess over five hundred dollars of the sum of the premiums paid in each year by him upon all such policies.

The referee, William A. Boyd, filed a report in favor of the widow Keller, which contained the following conclusions of law :—



I.—That the laws of the State of New York, and not the laws of the State of Massachusetts, are to govern as between the parties defendant herein, in determining their rights, as between themselves, to the fund represented by the policy of insurance issued by the plaintiff and which fund is now in the custody of this court.

II.—That none of the payments of premium upon said policy was made in fraud of the rights of creditors, or with intent to hinder, delay, or defraud creditors.

III.—That neither the said policy nor either of the policies of insurance mentioned in my eighth and ninth findings of facts comes within, nor are governed by Part 5, Title I, art. 6. chap. 8, sect. 89 of the Revised Statutes of the State of New York, providing that a married woman may cause her husband's life to be insured for her sole use ; but that when the premium paid in any year out of the property or funds of the husband shall exceed \$500, the excess over \$500 shall inure to the benefit of creditors.

IV.—That neither the assignee of said George F. Keller, nor his temporary administrator had any right or interest in or to the fund deposited herein by the plaintiff to the credit of this action or in or to any part thereof.

V.—That the defendant Phillipina Keller, the widow of said George F. Keller, and beneficiary under said policy, is entitled to the whole of the said fund so deposited by the plaintiff herein to the credit of this action.

This report was confirmed by Judge Donohue at special term. No appeal was taken from these decisions.

## POWER OF AGENT TO INSURE HIMSELF.

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*Appellate Court for the Third District of Illinois.*

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GLENS FALLS INS.-CO.

vs.

R. S. HOPKINS ET AL.

An agent cannot bind his principal in a contract with himself, without the acquiescence of the principal.

Authority from the general agent to countersign his own policies, will not authorize him to renew a contract to himself after a loss and issue a policy, not having charged himself with the premium nor having previously reported it to the company on the ground that he had verbally agreed with his partners for such renewal prior to the expiration.

McCULLOCH, J.

This was a suit by appellees against appellant to recover insurance money claimed in consequence of a loss by fire. The declaration counts upon two policies, the first of which had expired before the loss, but, as alleged, had been renewed by a parol agreement. The second was issued after the fire and antedated, as is claimed, in pursuance of a parol agreement made before the fire.

The proof shows that one Whitlock was general manager of appellant's business at Chicago, with power to appoint sub-agents. In pursuance of this power he had appointed appellee Hopkins, the agent of appellant at Homer, Illinois, with power to receive proposals for insurance, to fix and determine rates, to receive moneys and to countersign, issue and renew policies signed by the president and secretary. It was also his duty to make daily reports to Whitlock of policies issued and renewed or other business transacted for the company, giving a copy of the written portions of policies issued.

Appellee Hopkins had a store at Homer to which he gave his personal attention, and one at Ogden, in company with appellee, H. S. Nichols, who had the principal charge there.

After his appointment as agent, Hopkins wrote up a policy on his own stock of goods at Homer, and sent the same to Whitlock to be countersigned by him. Whitlock, according to the testimony introduced on the trial, replied in a letter stating that he appreciated his own modesty about countersigning his own policies, and directing him thereafter to sign them himself.

After that he countersigned several policies on his own stock and reported them to Whitlock in the usual order of business, and no objection was made.

On August 24, 1882, he issued policy No. 159, on the stock of goods, fixtures, and furniture in Ogden, owned by himself and Nichols, it being for \$4,000, and for the period of one year. Upon receiving the report of this policy, Whitlock made some objections by letter to Hopkins, that the rate of premium had not been given, and that it failed to specify the amounts respectively upon the store, fixtures, and furniture, and asking same to be done. Whitlock also, in his next letter, made some criticisms upon the amount of the risk in comparison with the value of the property insured, and stated that if there was no other insurance, or if there was and it was concurrent with that policy they would let it stand as written to accommodate him personally, although the practice was not a good one. This is the policy first sued on in this case. The copy in the record fails to show that the correction asked by Whitlock in his first letter to Hopkins had ever been made.

A short time before the expiration of this policy, Nichols went from Ogden to Homer, and had an interview with his partner Hopkins, about the insurance. At that time one F. O. Hopkins was in the employment of appellee, R. S. Hopkins, as book-keeper or clerk, and had authority from the latter to transact insurance business and sign policies in his name. The policy on the store in Ogden was then at Homer in the store safe, where also the surplus funds of the store in Ogden were kept. There was money of the firm there at that time sufficient to pay the premiums on the renewal, and appellee Hopkins had authority to use it for that purpose.

The substance of that interview as related by Nichols is substantially as follows: "When I got to Homer, met Mr. Hopkins somewhere near the door of his business house. I said I came over to

see about the Ogden insurance. I want you to keep that written up. Be sure of that. \* \* \* He said, give yourself no uneasiness, I will see that it is written up and kept written up. Give yourself no further trouble about it, and he said step back and see F. O. Hopkins, and then drove off. I went back and saw F. O. Hopkins. I said, I want to see the Ogden policy. We kept it in the safe there. He handed me the policy, and I looked at it and saw when it expired, and said to him this policy is all right yet ; I want you fellows to be sure and keep that policy written up ; keep it renewed, and he said all right."

After this, nothing was done towards the renewal of the policy until after the fire. No renewal was reported to Whitlock, no money of the Ogden firm was used in the payment of the premiums, and R. S. Hopkins had not charged himself with the same in his account with the company.

The fire took place on the 27th day of August, 1883, just three days after the policy had expired. Immediately after the fire appellee Hopkins went to Chicago, and saw Whitlock. He related to him all the circumstances above set forth and asked him to settle the claim, but he refused to recognize it. He then asked him if a policy could not be issued and antedated so as to correspond with his agreement, which Whitlock also refused.

The fire took place on Saturday. On the Monday following the second policy sued on, No. 181, was made out by F. O. Hopkins, and afterwards countersigned by him in the name of appellee, R. S. Hopkins. This last policy before it was signed, the latter took with him to Chicago and spoke of it to Whitlock, who refused to recognize any right to its renewal. After some unimportant correspondence between him and appellees, this suit was brought.

The cause was tried by the court without the intervention of a jury. Objection was made to the introduction in evidence of the alleged verbal agreement between Nichols and R. S. Hopkins on the ground of its being a private conversation between partners in relation to their business. We do not deem it necessary to discuss this point, as we are of the opinion that with all the proof there is in this record, appellees have failed to show a right of recovery.

The second policy was *prima facie* void, because it was issued after the property had been destroyed by fire. The first one had expired before the fire. The whole case therefore depends upon whether or not there was a valid contract for renewal.

It is a general principle of law, that an agent cannot bind his

principal in a contract with himself. In this case, appellees were partners and both interested in the alleged verbal contract, and both sue upon it. Without ratification by the principal, such a contract cannot be enforced: *New York Cent. Ins. Co. vs. Nat. Protec. Ins. Co.*, 14 N. Y. R., 85; *Bently vs. Columbia Ins. Co.*, 17 N. Y., 421; *Neundorff vs. The World Ins. Co.*, 69 N. Y. 391; *People's Ins. Co. vs. Paddon*, 8 Bradwell, 447; *May on Insurance*, 125.

We do not consider the previous authority given to Hopkins to countersign his own policies, covers the ground in question. Had he made out a new policy, countersigned it himself, reported it in the regular course of business, and charged himself with the premium in his account with the company, and no objection had been raised by the company until after the fire, we do not say the company might not have been bound. In such case it is possible the policy would have been good without countersigning.

But the authority to countersign policies issued to himself cannot be extended so as to cover verbal contracts made with himself, or with a firm of which he was a partner. Nor can it be extended so as to cover a policy executed after the fire. Such a policy must depend for its validity upon a prior agreement or undertaking to issue it, which as we have just seen did not and could not exist under the circumstances of this case. The authority of Hopkins was to issue bona fide policies, which this policy No. 181 was not.

For these reasons the judgment of the court below will be reversed and the cause remanded.

Reversed and remanded.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

AGENT.

§ 76. FIRE.—*Company Responsible for Representations of.*—Where the agent of the insurance company had authority to take the risk, and he filled out the application on the premises, which he had full opportunity to examine, his knowledge will be imputed to the company, and it will be estopped from claiming that the representations as to the construction and size of the premises were not true.

Jordan vs. State Ins. Co., 19 N. W. Rep., 917; Williams vs. Niagara Fire Ins. Co., 50 Iowa, 568; and Miller vs. Mutual Benefit L. Ins. Co., 31 Iowa, 223.

*Eggleston vs. Council Bluffs Ins. Co.*

Rep'd Jour'l, p. 365.

Iowa S. C.

## ASSIGNMENT.

§ 77. *LIFE.—Power of Wife.—Consideration for.—Limitation.*—In Indiana, in 1877, a married woman might, with the consent of her husband, make a valid assignment of a policy on the life of the husband, payable to her or her assigns.

Discussing *Wilburn vs. Wilburn*, 83 Ind., 55; *Harley vs. Heist* 86 Ind., 196; *Bushnell vs. Bushnell*, 92 Ind., 503; *Morcan vs. Branson*, 37 Ind., 195; *Baker vs. Armstrong*, 57 Ind., 189; *Paulman vs. Claycomb*, 75 Ind., 64. *Mather vs. Shank*, 94 Ind., 501-505; *Parks vs. Barrowman*, 83 Ind., 561; *Godfrey vs. Wilson*, 70 Ind., 50.

In considering the validity of exceptions to conclusions of law, the findings on which they are founded must be considered as correct. Where the consideration for an assignment was "value received," it may be shown what this value was. A payment of the husband's debts, and agreement to look solely to the policy and pay the premiums, is a sufficient consideration for an assignment.

*McDill vs. Gunn*, 43 Ind., 315-319; 3 *Washburn on Real Property*, 327; *Everhart vs. Puckett*, 73 Ind., 409, and see also *Hight et al. vs. Taylor*, 37 Ind., 392; *Hubble vs. Wright*, 23 Ind., 322; *Ellis vs. Kenyon*, 25 Ind., 134; *Buck vs. Axt.*, 35 Ind., 512; 1 *Parsons on Cont.*, 440-443.

The statute of limitations does not run during the period embraced in such agreement.

*Damron vs. Penn Mutual Life Ins. Co.*

Rep'd Jour'l, p. 387.

IND. S. C.

## APPLICATION.

§ 78. *LIFE.—Statement as to Diseases of near Relatives.—Incomplete Answer as to Consulting Physicians.*—When it is alleged that near relatives died afflicted with certain diseases, contrary to a statement in the application, a demurrer was properly sustained because such relatives were not mentioned, nor their relationship specified. Whether any person is a near relative is a question of law. The policy covenanted that the application should be full, complete, and true, and any suppression or omission should avoid it. In answer to a question how long since he had consulted a physician, and for what, insured stated a year previous, naming the physician, for a cold. *Held*, That

a demurrer was properly sustained to an allegation that he had since consulted other physicians for more serious ailments. The application must be construed strictly against the insurer, and in the absence of fraud an incomplete answer honestly made would not work a forfeiture.

*Eddington vs. Mut. Life Ins. Co.*, 67 N. Y., 185; *Dilleber vs. Home Life Ins. Co.*, 69 N. Y., 256; *John Hancock Mut. Life Ins. Co. vs. Daly*, 65 Ind., 6; *May on Ins.*, Sec. 200.

*Penn Mutual Life Ins. Co. vs. Wiler.*

*Rep'd Jour'l*, p. 337.

IND. S. C.

#### BROKER.

§ 79. FIRE.—*When not the Agent of the Company.—Non-payment of Premium.*—A policy of insurance on the plaintiff's factory provided that the company should not be liable "until the cash premium be actually paid to the company, or an agent of the company;" that any broker, or other person than the assured who had procured the policy, should be "deemed the agent of the assured, and not of the company;" that no person should be considered the agent of the company, unless he held the commission of the company; that there should be no waiver by the company of any term in the policy, except by express authority in writing. The insured, owning a large factory, placed their insurance in the hands of H. & Co., insurance brokers in New York; H. & Co. applied to B. & Co., insurance brokers in Jersey City, who obtained the policy and delivered it to H. & Co. B. & Co., had previously placed a few risks with the defendant, but was not, in fact, their agent. H. & Co. sent the premium to B. & Co., who kept it for several days, and until the property insured was burnt, when they sent it to the defendant, who refused to accept it. *Held*, That B. & Co. were not the agents of the company to receive payment of this premium for the company, and that the plaintiff could not recover.

*Peoria Sugar Refinery vs. Susquehanna Mut. F. Ins. Co.*

*Rep'd Jour'l*, p. 333.

PA. U. S. C. C.

#### DESCRIPTION.

§ 80. FIRE.—*Contained in.—Knowledge of Removal of Goods not a Waiver.*—The policy was on household goods, furniture, clothing, etc., "all contained in his two-story, frame dwelling-



house etc.," and also in another clause, on his horse, buggies, hay, etc. Much of the household goods was afterwards removed to the barn and stored there at the time of the fire on account of a previous fire which rendered the house uninhabitable. *Held*, That the policy did not cover the household furniture while in the barn. *Held*, That knowledge of the removal by the company was not a waiver of the policy as to location, nor was the company called upon to cancel the policy in view of such knowledge to avoid liability.

Hartford Ins. Co. vs. Farrish, 73 Ill., 166; Annapolis etc. R. Co. vs. Baltimore Fire Ins. Co., 32 Md., 37; s. c. 3 Amer. Rep., 112; and Bryce vs. Lorillard Ins. Co., 55 N. Y., 240.

*English vs. Franklin Fire Ins. Co.*

Rep'd Jour'l, p. 377.

MICH. S. C.

#### DESCRIPTION.

§ 81. FIRE.—*Reformation in Case of*.—Where property insured against loss by fire is described in the policy as located on "lots 7 and 8, in block 2, in the town of Floris," and there is no mistake as to the premises intended to be insured, but the property is in fact located on "lots 7 and 8, in block 2, of Harrington's Addition to the town of Floris," an action at law may be maintained on the policy without first proceeding in equity to reform it, and parol evidence will be admissible to explain the latent ambiguity as to the description of the property.

Bowman vs. Agricultural Ins. Co., 59 N. Y., 521; Wood, Ins., § 95; 2 Pars. Cont., 558. Distinguish Wood, Ins., § 95; Holmes vs. Charlestown Mut. Fire Ins. Co., 10 Metc., 211; Ewer vs. Washington Ins. Co., 16 Pick., 502.

*Eggleston vs. Council Bluffs Ins. Co.*

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#### DIVIDENDS.

§ 82. LIFE.—*Failure to Respond to Question in Pleadings*.—When the question in a suit in equity, as shown by the bill, is whether the policy of the directors of an insurance company in declaring dividends has been lawful and right, and the defendant fails to answer this question after repeated allowances of exceptions for failure to answer the point, the orator is entitled to take the bill as confessed, so far as this point is concerned.

*Hale vs. Continental Life Ins. Co.*

Rep'd Jour'l, p. 380.

Vt. U. S. C. C.

## EVIDENCE.

§ 83. *FIRE.—Letter from Attorney of Insured.*—A letter written by the attorney of the assured to the company, not in response to a communication from it, held improperly admitted in evidence, and being calculated to prejudice the jury, ground for reversing the judgment.

*Eggleston vs. Council Bluffs Ins. Co.*

—3776, 81

§ 84. *LIFE.—Of Medical Attendant Privileged.*—*Trustworthiness of.*—Under the Indiana statute all knowledge obtained by the physician through observation or examination is privileged.

*Stampton vs. Parker*, 19 Hun, 55; *Pierson vs. the People*, 79 N. Y., 424; *Frazer vs. Jennison*, 42 Mich., 207-224; *Excoelsior Mut. Aid Ass'n vs. Riddle*, 91 Ind., 84; *Masonic Mut. Benefit Ass'n vs. Beck*, 77 Ind., 203; *Johnson vs. Johnson*, 14 Wend., 437; *Grand Rapids etc. R. R. vs. Martin*, 41 Mich., 667; *Scripps vs. Foster*, 41 Mich., 742; *Allen vs. Public Adm'r.*, 1 Bradf., 221; *People vs. Stout*, 3 Parker, Cr., 670; *Gostside vs. Conn. Mut. Life Ins. Co.*, Mo. S. C., 16 Cent. L. J., 253.

Declarations of insured regarding his health, uttered long before the application and not part of the *res gestæ* are not evidence.

*Swift vs. Mass. Mut. Life Ins. Co.*, 63 N. Y., 186; *Eddington vs. Mut. Life Ins. Co.*, 67 N. Y., 185; *Dilliber vs. Home Ins. Co.*, *supra*; *Mut. Life Ins. Co. vs. Applegate*, 7 Ohio St., 292; *Hurd vs. Masonic Mut. Benefit Soc.*, 6 Ins. Law Jour., 792; *Mobile Life Ins. Co. vs. Morris*, 3 Leo., 101; *May on Ins.*, sec. 214; *Bliss Life Ins.*, sec. 371 et seq.

The trustworthiness of conflicting testimony is a question for the jury.

*Penn Mutual Life Ins. Co. vs. Wiler.*

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## INSOLVENCY.

§ 85. *LIFE.—Constitution of Illinois Statute.*—*Impairment of Contracts.*—The Illinois statute of 1869 requires the auditor to compel life companies whose reserve is below the standard to suspend new business and also provides that he shall institute proceedings in the courts to suspend or prohibit the company from doing further business, in case of apparent insolvency, or

when such action is needed for the protection of the insured. The law was enforced against a life company doing business under a special charter granted previous to the act. *Held*, That the State had a reserved right to pass such subsequent laws as might be needed to prevent the privileges granted in the charter from being abused. The condition is implied that the company shall be subject to such reasonable regulations as the legislature may enforce. *Held*, That the State enactments do not impair the obligation of the company's contracts within the meaning of the constitution of the United States.

*Terrett vs. Taylor*, 9 Cranch, 51; *Sinking Fund Cases*, 99 U. S., 70; *Commonwealth vs. Farmers & Mechanics' Bank*, 21 Pick., 542; *Commercial Bank vs. Mississippi*, 4 S. & M., 503; *R. R. Co. vs. Rock*, 4 Wall., 180; *Knox vs. Exchange Bank*, 12 ib., 383; 2 *Kent's Com.*, 304, 312; *Slee vs. Bloom*, 5 Johns. Chy., 379; *Com. vs. F. & M. Bank*, 21 Pick., 542; *Angell & Ames on Corporations*, § 774 and note, 9th Ed.

*Chicago Life Ins. Co. vs. Needles*.

Rep'd Jour'l, p. 347.

ILL. U. S. S. C.

#### LIMITATION.

§ 86. FIRE.—*Evidence of Waiver*.—Where it is provided in a fire insurance policy that suit must be brought within six months after a loss, letters containing promises of payment, which induced plaintiff not to bring her action before the expiration of the six months, are not properly exhibits to be attached to the complaint, and when so made part of the pleadings should on motion be stricken out. Where the answer sets up the expiration of the six months as a bar to the action, such letters are admissible in evidence to sustain the plaintiff's claim that the promises therein made caused the delay in bringing suit.

*Eggleston vs. Council Bluffs Ins. Co.*

—1876, 81, 83

#### PROOFS OF LOSS.

§ 87. FIRE.—*Waiver of.—When Impossible*.—The provision in a fire insurance policy requiring written proofs of loss, may be waived by the agents of the company, and being so waived in the case at bar, the suit was not prematurely brought.

Wood, Ins., §§ 414, 496 ; Lycoming Fire Ins. Co. vs. Dunmore, 75 Ill., 14 ; Patterson vs. Triumph Ins. Co., 64 Me., 500.

Where it can be shown that, without any fault or fraud on the part of the assured, it is impossible for him to procure written proofs of loss, he may recover without performing the condition of the policy requiring such proofs.

Wood, Ins., § 423 ; Bumstead vs. Dividend Mut. Ins. Co., 12 N. Y., 81 ; O'Brien vs. Commercial Fire Ins. Co., 63 N. Y., 111.

*Eggleston vs. Council Bluffs Ins. Co.*

—§§ 76, 81, 83, 86

#### TITLE.

§ 88. FIRE.—*Levy of Execution on the Property.—Effect on Policy.*—The levy of an execution upon personal property is not such a change in the title or possession as will render void a policy of insurance upon the property which provides that, "If the property be sold or transferred or any change takes place in title or possession," the policy shall be void. The possession of the sheriff under the levy is but a qualified possession and in no way opposed to a possession by the execution debtor so far as necessary to preserve the property from spoliation or destruction.

*Western Assurance Co. vs. Laver, etc.*

Decision rendered, Feb. 25, 1885.

KY. C. A.

§ 89. FIRE.—*Of Stockholders having a Lien not Sole, Absolute, and Unqualified.—Estoppel.*—An insurance was effected by the plaintiffs on a stock of goods, the property of a corporation in which they were stockholders, and which goods they were holding as security for advances ; their application described the property as their own ; the policy referred to the application, and made it a part thereof, and all statements therein warranties, and provided that if the assured were not the sole, absolute, and unconditional owners of the property insured, and such interests were not truly stated in the policy, then, and in every such case, the policy should be void. *Held*, That the policy was void, and that the insurers were not estopped to deny its invalidity, because they did not assert the same immediately after the fire, when they discovered the true nature of the plaintiff's interest.

Southwick vs. Atlantic F. & M. Ins. Co., 133 Mass., 457; Lasker vs. St. Joseph F. & M. Co., 86 N. Y., 424; Mers vs. Franklin Ins. Co., 68 Mo., 127; Rohrback vs. Germania F. Ins. Co., 62 N. Y., 47; May on Ins., 507; Security Ins. Co. vs. Fay, 22 Mich., 467.

*McCormick vs. Springfield F. & M. Ins. Co.*

Rep'd Jour'l, p. 373.

CAL. S. C.

### WAIVER.

§ 90. FIRE.—*Of Policy Provision when it Cannot be Proved by Parol Evidence.—But Parol Evidence is Admissible to Show Course of Dealings with Broker.*—Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver, except by the authority of the company expressed in writing. But such a waiver can be proved by parol testimony showing the course of business of the company which issued the policy in its dealings with the broker who procured the policy.

*Peoria Sugar Refinery vs. Susquehanna Mut. Fire Ins. Co.*

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### WAREHOUSEMAN.

§ 91. FIRE.—*Liability for Loss of Grain.*—Where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his wrong or negligence.

Lupton vs. White, 15 Vesey, 432; 2 Kent Com. (12th ed.), 365, 590; Story Bail, section 40; Law of Prod. Ex., section 152; 2 Schouler Pers. Prop., section 46; 6 Am. L. Rev., 457; 2 Blackstone Com. (Cooley's ed.), 404, n. Law of Prod. Ex., section 154, auth. n. 9; Ledyard vs. Hibbard, 48 Mich., 421; s. c., 42 Am. R., 474; Nelson vs. Brown, 44 Iowa, 455; Sexton vs. Graham, 53 Iowa, 181; Nelson vs. Brown, 53 Iowa, 555; Irons vs. Kentner, 51 Iowa, 88; s. c., 33 Am. R., 119; Pribble vs. Kent, 10 Ind., 325; Ewing vs. French, 1 Blackf., 353; Carlisle vs. Wallace, 12 Ind., 252; Ashby vs. West, 3 Ind., 170.

*Rice vs. Nixon.*

Rep'd Jour'l, p. 323.

IND. S. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## SUPREME COURT OF INDIANA.

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*From the Fountain Circuit Court.*

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RICE ET AL. )  
                  ) *vs.*  
NIXON.\* )

Where a warehouseman receives grain to be stored for the owner, and places it in a common bin with his own and that received from other depositors, and sells from this receptacle, retaining always sufficient to supply each owner, the contract continues one of bailment, and the warehouseman is not liable for a loss resulting from an accidental fire not attributable to his wrong or negligence.

J. S. NAVE, B. F. HEGLER, W. S. POTTER, and A. A. RICE, *for Appellants.*

T. F. DAVIDSON, *for Appellee.*

ELLIOTT, C. J.

The appellee was a warehouseman, and it was his custom to receive wheat on deposit and to place it in a common bin with wheat bought by him, and it was also his custom to sell wheat from this bin, but of this custom the appellants had no knowledge. In August, 1882, the appellant, Victoria Rice, deposited with the appellee two hundred and ten bushels of wheat; this was thrown into the

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\* Filed, September 17, 1884.

common bin in accordance with the custom of the appellee, and with it was mingled wheat bought by him and wheat stored by other depositors, and from this bin wheat was sold, from time to time, but there was always in the bin wheat enough to supply all depositors, and at any time before the destruction of the warehouse by an accidental fire the appellant could have received from the bin all the wheat she had deposited. Some time after the storage of the wheat the warehouse and all its contents were destroyed by fire, but the fire was not attributable to the wrong or negligence of the appellee. No demand was made for the wheat until after its destruction. The wheat was stored with the appellee, and there was no agreement that the bailor should have an option to demand the grain or its value in money.

There are cases in which a bailee is responsible for the loss of goods where he commingles them with his own, but this principle does not apply where a warehouseman receives grain to be stored for the owner. Articles of such a character can be separated by measurement, and no injury results to the owner from the act of the warehouseman in mingling them with like articles of his own. This doctrine is older, at least, than *Lupton vs. White*, 15 Vesey, Jr., 432, for there Lord Eldon said: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another, and they were of equal value, the latter must have the given quantity; but, if articles of different value are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell, what was the original value of his property, he must have the whole." Chancellor Kent takes a like view of the question, and his last editor, Judge Holmes, cites a great many cases upon the subject: 2 Kent Com. (12th ed.), 365, 590. This is the view taken by the text-writers and courts generally in cases where the deposit is made with a warehouseman: Story Bail, section 40; Law of Prod. Ex. section 152; 2 Schouler Pers. Prop., section 46; 6 Am. L. Rev., 457; 2 Blackstone Com., Cooley's ed., 404, n. There is, however, as shown by the cases cited, some conflict of opinion, but, as said in a late work, the great weight of authority is that the contract is one of bailment and not of sale, the warehouseman and the depositor becoming owners as tenants in common: Law of Prod. Ex., section 154, auth. n. 9.

To the authorities cited by the authors referred to may be added *Ledyard vs. Hibbard*, 48 Mich., 421; s. c., 42 Am. R., 474; *Nelson*

vs. Brown, 44 Iowa, 455 ; Sexton vs. Graham, 53 Iowa, 181 ; Nelson vs. Brown, 53 Iowa, 555 ; Irons vs. Kentner, 51 Iowa, 88 ; s. c., 33 Am. R., 119, where the rule is carried much farther than is necessary in the present instance. The rule which we accept as the true one is required by the commercial interests of the country, and is in harmony with the cardinal principle that the intention of contracting parties is always to be given effect. It is not unknown to us, nor can it be unknown to any court, for it is a matter of great public notoriety and concern, that a vast part of the grain business of the country is conducted through the medium of elevators and warehouses and it cannot be presumed that warehousemen in receiving grain for storage, or depositors in entrusting it to them for that purpose, intended or expected that each lot, whether of many thousand bushels, or of a few hundred, should be placed in separate receptacles ; on the contrary, the course of business in this great branch of commerce, made known to us as a matter of public knowledge and by the decisions of the courts of the land, lead to the presumption that both the warehouseman and the depositor intended that the grain should be placed in a common receptacle and treated as common property. This rule secures to the depositor all that in justice he can ask, namely, that his grain shall be ready for him in kind and quantity whenever he demands it. Any other rule would impede the free course of commerce and render it practically impossible to handle our immense crops. It is reasonable to presume that the warehouseman and his depositor did not intend that the course of business should be interrupted, and that they did not intend that the almost impossible thing of keeping each lot, small or great, apart from the common mass should be done by the warehouseman. If the warehouseman is not bound to place grain in a separate place for each depositor, then, the fact that he puts it in a common receptacle with grain of his own and that of other depositors, does not make him a purchaser, and if he is not a purchaser, then he is a bailee. In all matters of contract, the intention of the parties gives character and effect to the transaction, and in such a case as this the circumstances declare that the intention was to make a contract of bailment and not a contract of sale. The duties, rights, and liabilities of warehousemen are prescribed by the law as declared by the courts and the legislature, and as matter of law it is known to us that a warehouseman, by placing grain received from a depositor in a common receptacle, and treating it as the usages of trade warrant, does not become the buyer of the grain, unless, in-



deed, there is some stipulation in the contract imposing that character upon him.

The cases in our own reports, cited by counsel for the appellants, do not oppose the conclusion here reached. In *Pribble vs. Kent*, 10 Ind., 325, the defendants received of the plaintiff one hundred and thirty-two bushels of wheat, and on demand failed to deliver the wheat, and it was held that an action would lie, but the contract was held to be one of bailment, and not of sale. It is plain, therefore, that in the case cited there was no such ruling as that asked by the appellants in the present case; on the contrary, the ruling overturns their theory. In *Ewing vs. French*, 1 Blackf., 353, and *Carlisle vs. Wallace*, 12 Ind., 252, the wheat was delivered to a miller to be ground into flour, and this was held to be a sale, on the ground that the character of the article was to be entirely changed, and a new and different article was to be given by the miller to his customer in return for the wheat. In the last of the cases cited the option of demanding wheat, flour, or money was vested in the depositor, so that he had the option of making the contract one of bailment or one of sale, and he exercised that option by treating the transaction as a sale. In the case under examination there was no option, for it is expressly found that the wheat was received by a warehouseman for storage. The case of *Ashby vs. West*, 3 Ind., 170, holds that one who delivers wheat to be manufactured into flour is the owner of the flour, and may maintain replevin, the court saying: "We are clearly of the opinion that that contract is one of bailment, and not of sale," and this is against the contention of the appellants.

In deciding that the contract was one of bailment, and not of sale, we determine the only debatable question in the case, for it has been long settled that where property in the custody of a bailee is destroyed by an accidental fire, and there has been no fault or negligence on his part, he is not liable.

We have examined the rulings on the demurrers to the answers and think they were correct, but if we were wrong in this there could be no reversal, because the special finding clearly shows the ground on which the judgment rests, and from this it appears that if the rulings were erroneous the errors were harmless.

**Judgment affirmed.**

## UNITED STATES CIRCUIT COURT.

## EASTERN DISTRICT OF PENNSYLVANIA.

PEORIA SUGAR REFINERY

vs.

SUSQUEHANNA MUT. F. INS. CO.\*

Waiver of an express provision in a policy of fire insurance cannot be proved by parol testimony showing that the general custom among insurance companies and brokers is otherwise than as stated in the provision, when there is another clause in the policy providing that there shall be no waiver, except by the authority of the company expressed in writing.

But such a waiver can be proved by parol testimony showing the course of business of the company which issued the policy in its dealings with the broker who procured the policy.

A policy of insurance on the plaintiff's factory provided that the company should not be liable "until the cash premium be actually paid to the company, or an agent of the company;" that any broker, or other person than the assured who had procured the policy, should be "deemed the agent of the assured, and not of the company;" that no person should be considered the agent of the company, unless he held the commission of the company; that there should be no waiver by the company of any term in the policy, except by express authority in writing. The insured, owning a large factory, placed their insurance in the hands of H. & Co., insurance brokers in New York; H. & Co. applied to B. & Co., insurance brokers in Jersey City, who obtained the policy and delivered it to H. & Co. B. & Co., had previously placed a few risks with the defendant, but was not, in fact, their agent. H. & Co. sent the premium to B. & Co., who kept it for several days, and until the property insured was burnt, when they sent it to the defendant, who refused to accept it. *Held*, That B. & Co. were not the agents of the company to receive payment of this premium for the company, and that the plaintiff could not recover.

Motion to take off compulsory nonsuit.

This was an action of assumpsit on a policy of insurance for \$1,500, dated August 25, 1881. At the trial, before Butler, J., November 13,

\* Decision rendered, Feb. 6, 1884. From *Federal Reporter*.

1883, the plaintiffs offered in evidence the policy, proved the total destruction of the property insured on October 27, 1881, and their compliance with all the requirements of the policy as to furnishing proofs of loss, etc. The policy contained the following clauses:—

“1. This company shall not be liable by virtue of this policy, or any renewal thereof, until the cash premium be actually paid to the company, or to an agent of the company.”

“2. If any broker, or other person than the assured, procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance.

“3. Only such persons as shall hold the commission of this company shall be considered as its agents in any transactions relating to the insurance, or any renewal thereof, or the payment of premium to the company. Any other person shall be deemed to be the agent of the assured, and payment of the premium to such person shall be at the sole risk of the assured.”

“6. The use of general terms, nor anything less than a distinct agreement, clearly expressed and indorsed by this company on this policy, shall be construed to be a waiver of any printed or written term, condition, or restriction thereof, nor can any such printed or written term, condition, or restriction be waived by any agent of this company, either before or after a loss, without special authority in writing from the company.”

It appeared from the testimony that the insurance was negotiated by Hamlin & Co., of New York, through W. W. Buckley & Co., insurance brokers of Jersey City. The policy was received by Buckley & Co. from the home office of the defendant company in the early part of September, 1881, and immediately sent to Hamlin & Co., who forwarded it at once to the plaintiff. The premium was received by Hamlin & Co. on October 1 or 2, 1881, from the plaintiff, and sent to Buckley & Co., on October 21, 1881, who sent a check for it to the defendant on October 29, 1881. Meantime, on October 27, 1881, the property insured had been totally destroyed by fire. The defendant thereupon refused to accept the premium, and returned the check to Buckley & Co.

At the trial, after proving the facts as stated, the plaintiff offered to show by a member of the firm of Buckley & Co., the course of business between the witness' firm and the defendant, with a view of proving authority on the part of the witness' firm to accept payment of the premium for the defendant. This offer was admitted, and the

witness testified in substance that, before this transaction took place, his firm had obtained many policies from the Susquehanna Fire Insurance Company, sent the applications, and the company returned the policies to them; and they had a common form of policy. He collected the premiums and forwarded them to the company, sometimes a day and sometimes a week or more after receiving them. The company never objected to their delivering policies without receiving premiums, and they never wrote to dun him for not sending delayed premiums. Plaintiffs then offered to show by the witness, as an expert in the insurance business, that it is the custom in that business, when carried on through brokers, to issue policies without requiring prepayment of the premium, and allowing the broker to remit in payment at stated or convenient intervals. Upon objection, the court refused the offer. The plaintiffs then closed, and the defendant moved for a nonsuit, which was granted, with leave to move to take it off.

WALTER GEORGE SMITH and FRANCIS RAWLE, *for the motion.*

Where the policy is delivered without requiring payment of the premium, the presumption is that a credit is intended; and the rule is well settled where a credit is intended that the policy is valid, though the premium was not paid at the time the policy was delivered: *Miller vs. Ins. Co.*, 12 Wall., 303; *Behler vs. Ins. Co.*, 68 Ind., 347; *Boehen vs. Ins. Co.*, 35 N. Y., 134; *Eagan vs. Ins. Co.*, 10 W. Va., 583. A waiver of the payment of premium may be inferred from any circumstances fairly showing that the insurers did not intend to insist upon the prepayment of the premium as a condition precedent: *Equitable Ins. Co. vs. McCrea*, 8 Lea, 541; *Heaton vs. Manhattan Ins. Co.*, 7 R. I., 502; *Hanley vs. Life Ass'n*, 4 Mo. App., 253; *Goit vs. N. P. Ins. Co.*, 25 Barb., 189; *Bodine vs. Ins. Co.*, 51 N. Y., 117; *May, Ins.*, § 340. A condition may be waived by parol, although there is a clause in the policy saying that no condition can be waived except in writing: *Carson vs. Ins. Co.*, 43 N. J. Law, 300; s. c., 39 Amer. Rep., 584; *Ins. Co. vs. Norton*, 96 U. S., 234; *Thompson vs. Ins. Co.*, 104 U. S., 252; *Phoenix Ins. Co. vs. Doster*, 106 U. S., 35; s. c., 1 Sup. Ct. Rep., 18. There was sufficient evidence of waiver to give the case to the jury: *Coursin vs. Penn. Ins. Co.*, 46 Pa. St., 323; *Patterson vs. Ins. Co.*, 22 Pitts. L. J., 205. The learned judge should have admitted plaintiff's offer to show that it was a general custom among insurance companies and brokers to

issue policies without requiring payment of premium, even when there is a clause of limitation similar to the one in this case: *Helme vs. Phila. Life Ins. Co.*, 61 Pa. St., 107; *Girard vs. Mutual Life Ins. Co.*, 86 Pa. St., 236; *Baxter vs. Massasoit Ins. Co.*, 13 Allen, 320; *Pino vs. Merchants' Ins. Co.*, 19 La. Ann., 214; *Union Cent. Ins. Co.*, 72 Pottker, 33 Ohio St., 459.

**FLEMING & MCCARRELL, *Contra.***

This case is settled by *Pottsville M. I. Co. vs. Min. Sp. Imp. Co.*, 100 Pa. St., 137.

**BY THE COURT.** The motion is refused.

## SUPREME COURT OF INDIANA.

NOVEMBER TERM, 1884.

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*Appeal from the Allen Superior Court.*

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PENN MUT. LIFE INS. CO.

vs.

ROSETTA WILER.\*

When it is alleged that near relatives died afflicted with certain diseases, contrary to a statement in the application, a demurrer was properly sustained because such relatives were not mentioned, nor their relationship specified. Whether any person is a near relative is a question of law.

The policy covenanted that the application should be full, complete, and true, and any suppression or omission should avoid it. In answer to a question how long since he had consulted a physician and for what, insured stated a year previous, naming the physician, for a cold.

*Held*, That a demurrer was properly sustained to an allegation that he had since consulted other physicians for more serious ailments. The application must be construed strictly against the insurer, and in the absence of fraud an incomplete answer honestly made would not work a forfeiture.

Under the Indiana statute all knowledge obtained by the physician through observation or examination is privileged.

Declarations of insured regarding his health, uttered long before the application and not part of the *res gestae*, are not evidence.

The trustworthiness of conflicting testimony is a question for the jury.

BLACK, C.

This was an action brought upon a policy of insurance on the life of Solomon Wiler, wherein the appellant promised and agreed to and with said assured, his executors, administrators, and assigns, to pay the sum insured to his wife, the appellee, her executors, administrators, or assigns, within sixty days after due notice and

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\* Decision rendered, January 28, 1885.

proof of his death. There was an answer of eight paragraphs, the first being a general denial. Demurrers to the fourth, sixth, seventh, and eighth paragraphs were sustained.

The plaintiff replied, and a trial by jury resulted in a verdict for the plaintiff, on which judgment was rendered, a motion for a new trial having been overruled.

The appellant in argument here has objected to the complaint on the ground that the policy made the application therefor a part of the contract, and that therefore the application should have been set out with the complaint.

We will not take space to fully state or to discuss the question suggested by the appellee as to whether the assignment of errors presents for decision the question involved in this objection to the complaint, but we dispose of the subject by saying that it may now be regarded as an established rule in this State that in such a case the application or a copy thereof need not be filed with the complaint: *Continental Life Ins. Co. vs. Kessler*, 84 Ind., 310.

In each paragraph of the answer except the first, it was alleged, in substance, that prior to the execution of the policy, said Solomon Wiler executed to the defendant an application in writing and print, signed by him, of which a copy was made an exhibit; that the policy was issued in pursuance of, and was based upon, said application; that it was expressly stipulated and provided in the policy and in the application that the latter should and did constitute part of the contract of insurance; and that all the statements and declarations thereof should be regarded as warranties, and material, and that if the same should be in any respect untrue, the policy should be null and void. Each of said special paragraphs alleged that the statements and declarations contained in said application were false and untrue in certain respects stated. The provision of the policy thus referred to by the answers was as follows: "And it is also understood and agreed to be the true intent and meaning hereof, that if the application for insurance made to the said company by said Solomon Wiler, and bearing date the first day of November, 1879, a true copy whereof is placed on the back of this policy, and upon faith in the truth and accuracy whereof this agreement is made, which application is hereby made part of this contract, and the statements and declarations of which are to be mutually regarded as warranties and material, shall be found in any respect untrue, then, and in such case, this policy

shall be null and void." Following the questions and answers in said application were certain provisions whereby it was covenanted and agreed "that this declaration and the above-mentioned answers and proposal contained in the foregoing application, whether written by his own hand or not, every person whose name is hereto subscribed adopts as his own, and warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries, which shall be the basis of the contract between the undersigned and said company." And it was further covenanted and agreed "that if there has been any suppression or omission of any fact by the party making this application, or if an untrue or fraudulent allegation be contained herein or in the foregoing answers and proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy of insurance made on the faith of this declaration and of the above answers and proposal shall become null and void and of no effect."

The second and third paragraphs of answer alleged the making of untrue statements by the assured in said application, in answer to certain questions as to whether he had suffered from or been subject to divers physical ailments.

In the fifth paragraph, it was shown, among other things, that in said application, in answer to the question, "How many full brothers has the party had?" the assured answered, "Eight;" and that under the word "living," in a column immediately after said question, he had answered, "six." And it was alleged that, in truth, he had not had eight full brothers, six of whom were living.

In the fourth paragraph of answer it was alleged, by way of showing an untrue statement in the application, "that in answer to question number thirteen of said application, which is as follows: "Has any near relative been afflicted with or died of consumption, cancer, disease of the heart, or any scrofulous disease, apoplexy, insanity, gout or disease of the kidneys?" the said Solomon Wiler answered, "No;" whereas, in fact, the said Solomon Wiler had near relatives who were afflicted with and died of consumption, before the signing and making of said application for insurance."

It is agreed by counsel for both parties that the demurrer to this paragraph was sustained for the reason that the pleading did not name the near relatives alleged to have been afflicted with and to have died of consumption, or state the degree of their relationship to the life assured.



We think the court below based its ruling upon a sufficient reason. Whether any particular person was a near relative within the meaning of the contract, was a question of law, and the pleading stated a conclusion of law.

Among the interrogatories and answers in the application were the following: Questions. "18. A. How long since he was attended by a physician or professionally consulted one? B. For what disease? C. Give the name and residence of the physician who attended him. D. Give the name and residence of his usual medical adviser or family physician, to whom he refers for a certificate." Answers. "A. About one year ago. B. Bad cold. C. Dr. Isaac Rosenthal, Fort Wayne, Indiana. D. Dr. Isaac Rosenthal, Fort Wayne, Indiana." The sixth, seventh, and eighth paragraphs of the answer related to these interrogatories and answers.

The sixth paragraph, after the inducement above stated common to all the special paragraphs, set out said questions and answers, and alleged that the insured had been attended by and had professionally consulted Dr. George T. Bruback, a practicing physician, on the 22d day of May, 1879, and on other subsequent days, for diseases other and more serious than a bad cold; to wit, for bronchial asthma and bronchial catarrh, all which consultations and attendance were within less than six months before the making of said application, which was on the 1st of November, 1879.

The seventh paragraph was like the sixth, except that it mentioned as the physicians whom the insured had professionally consulted and by whom he had been attended, Dr. Isaac Rosenthal and three others named, and stated that the diseases for which they had treated him were asthma, bronchitis, consumption, and other diseases.

The eighth paragraph, besides said inducement and said extract from the application, alleged that it was specially covenanted and agreed by said Solomon Wiler in said application and as part of said contract of insurance, that he would and did warrant all the answers in said application contained to be full, complete, and true, and that if there had been any suppression or omission of any part in said answers, then said policy of insurance should be void and of no effect. The provisions of the application thus referred to were the general provisions set out therein after the questions and answers.

The eighth paragraph contained averments like those of the seventh, and further alleged that while it was true that said Dr. Isaac Rosenthal, about a year before the making of said application

attended the applicant for a bad cold, yet he, by his said answers, suffered and omitted to state the more important and material facts that he had professionally consulted and been attended by said Dr. Isaac Rosenthal and said other physicians, for fever, asthma, bronchitis and consumption, so that said answer was not full and complete, without omission or suppression, as it was covenanted, agreed, and warranted it should be by the terms of said policy and application. "Wherefore the defendant says that by reason of said breach of covenants and warranty in said policy and application contained, the said policy of insurance has become and is wholly null and void."

We think that there was no error in sustaining the demurrers to these answers. It is not shown that any of the statements made by the applicant were in themselves untrue.

The contract of insurance should be liberally construed with a view to effectuate its purpose. The language of the policy and of the interrogatories and provisions of the application is carefully and deliberately pre-arranged by the insurer; in its preparation the insured has no part. Whatever there may be in the language so prepared by the insurer which has any tendency to defeat the main purpose of the contract should be strictly construed against the insurer.

If there be any ambiguity in an interrogatory propounded to the appellant, or it be capable of more than one answer, it should be construed most strongly against the insurer, and most favorably to the insured, in whose favor all doubt should be resolved. If the answer given to any interrogatory, being itself true, though the question be such as to suggest a fuller and more detailed answer, yet if the insurer be content with the partial answer, he cannot claim a warranty extending beyond the partial answer. Warranties in insurance policies are always strictly construed.

If the answer to any of the many questions propounded to the applicant was in itself untrue, there was a breach of warranty. If all the answers were true, there was no breach of warranty; and the general provision following the questions and answers in the application could not make a true answer a breach of warranty. We think it would not be understood by the applicant from those general provisions that, if all his answers were true, and honestly made, the policy should be void for an unintentional omission of some fact without which some answer was not full. If the answers were true in themselves, and there was no intentional suppression or omission, no fraud on his part, his answers should not be held to avoid the

policy. It was not alleged in any of the paragraphs of answer that there was an intentional omission or suppression, or that any answer in the application was fraudulently incomplete. See *Eddington vs. Mut. Life Ins. Co.*, 67 N. Y., 185; *Dilleber vs. Home Life Ins. Co.*, 69 N. Y., 256; *John Hancock Mut. Life Ins. Co. vs. Daly*, 65 Ind., 6; *May on Ins.*, Sec. 200.

On the trial the defendant introduced certain physicians as witnesses, and offered to prove by them that at various times before the date of the application for insurance, when they had professionally attended the insured, he was suffering from asthma and other diseases. Upon objection made by the plaintiff, such evidence was excluded. The objections were made and sustained on the ground that the facts which it was thus sought to prove were within the provision of the statute in relation to matter communicated to physicians by their patients.

Our statute upon this subject has undergone some changes at various times. The form in which it existed at the time of the trial of this cause is found in section 497, R. S., 1881, as follows: "The following persons shall not be competent witnesses: \* \* physicians, as to matter communicated to them as such, by patients, in the course of their professional business, or advice given in such cases."

It does not devolve upon us in this connection, we scarcely need say, to adopt or reject, or to formulate a rule of evidence. A statute which the legislature had authority to enact is the rule, and it only belongs to us to interpret it in particular cases. As to the wisdom of the rule of the common law protecting confidence between attorney and client, there has been general agreement among judges.

Mr. Appleton, in his *Rules of Evidence*, in advocating its abolishment as a needed reform, found it "difficult to perceive wherein consists the difference between the confidence which exists between physician and patient," and "that subsisting between the client and attorney, and why different rules should obtain in the last from those adopted in the former cases." While the modern statutory changes in this and other States upon the subject of witnesses have not included the abolishment of the protection of confidences between attorney and client, which in this State are expressly protected by statute, they have extended what was evidently intended to be a like protection to confidences between physician and patient.

Under our statute, when by its terms it provided that physicians were not competent witnesses "as to matters confided to them in

the course of their profession, \* \* \* unless with the consent of the party making such confidential communication," it was held by this court, in agreement with authorities elsewhere, that the evidence which might be excluded was not only such as related to what the patient told the medical witness, whether under injunction of secrecy or otherwise, but also such as related to what the physician learned by observation or by examination of the patient without regard to the character of the supposed ailment: *Masonic Mut. Benefit Ass'n vs. Beck*, 77 Ind., 203.

The same construction should be given to the statute in its present form. It is plain that without such a construction the statute would be of but little practical efficacy for the purpose intended in its enactment. That the present statute should be so construed is, in effect, held in *Excelsior Mut. Aid Ass'n vs. Riddle*, 91 Ind., 84.

The purpose of the statute is not the suppression of truth needed for reaching correct results in litigation, though this may sometimes incidentally occur (as it may also in other instances of exclusion on the ground of wise policy), but the purpose is the promotion and protection of confidence of a certain kind, the inviolability of which is deemed of more importance than the results sought through compulsory disclosure in a court of justice.

Notwithstanding the absolutely prohibitory form of our present statute, we think it confers a privilege, which the patient for whose benefit the provision is made, may claim or waive. It gives no right to the physician to refuse to testify, and creates no absolute incompetency. To hold otherwise would result in many cases in obstructing justice without subserving the purpose of the statute. In this opinion we are in agreement with the view taken by other courts of enactments upon this subject in form absolutely prohibitory: *Johnson vs. Johnson*, 14 Wend., 437; *Grand Rapids etc. R. R. vs. Martin*, 41 Mich., 667; *Scripps vs. Foster*, 41 Mich., 742; *Allen vs. Public Adm'r.*, 1 Bradf., 221; *People vs. Stout*, 3 Parker, Cr., 670. And in the case like the one at bar, *Excelsior Mut. Aid Ass'n vs. Riddle*, supra, in considering the exclusion of testimony of an attending physician, upon objection based upon the ground that it was privileged, this court approved the rejection of the testimony, and said that, so far as the question under consideration was concerned, there was no substantial difference between the statute of 1881, and the former law under which *Masonic Mut. Benefit Ass'n vs. Beck*, supra, was decided. As in the case of attorney and client, the inviolability of the confidence, the right of objecting to the dis-

closure of matter communicated to a physician as such by his patient, does not cease with the death of the latter. This view is reasonable, and it is supported by the decided cases. We do not deem it necessary or proper for us to attempt in this opinion to indicate what should be the effect of this statute in other supposable cases which may come up to this court, and, in view of previous decisions here, we have been induced to say thus much upon the subject only because of the earnest argument of the learned counsel for the appellant. See, however, *Allen vs. Pub. Adm'r*, *supra* ; *Stampton vs. Parker*, 19 Hun, 55 ; *Pierson vs. the People*, 79 N. Y., 424 ; *Frazer vs. Jennison*, 42 Mich., 206-224.

Not without the careful consideration asked by counsel, we are constrained to interpret the statute as giving to a person having such a relation to the deceased patient, and a contract made by him as that sustained by the appellee, the right in a suit by her on the contract either to waive the statute or to object on the ground thereof.

It may be said that in such case she represents the patient for such purpose. The statute is remedial and should be liberally construed with a constant view to its purpose.

Confining our decision to the case before us, we are satisfied that a proper application of the statute was made in *Masonic Mut. Benefit Ass'n vs. Beck*, *supra*, and *Excelsior Mut. Aid Ass'n vs. Riddle*, *supra*. Besides the citations in the former case, see *Gostside vs. Conn. Mut. L. Ins. Co.*, Mo. (16 Cent. L. Jour., 253).

The plaintiff, by way of rebuttal, introduced as a witness the physician who, on behalf of the defendant as medical examiner, had examined the insured for this insurance, and elicited testimony from him tending to prove that the insured was in good health at the time of the application.

Afterwards, the defendant recalled the physicians before introduced by the defendant, and again sought from them the evidence which had been excluded as above stated.

Upon objection, their testimony was again excluded. This offer was made upon the theory that the plaintiff by having herself introduced the testimony of one physician, had waived her right to object to the testimony of other physicians. This theory is not well founded. If the plaintiff's examination of said medical examiner as a witness could be regarded as a waiver of a privilege, the consent of the patient or of one entitled to stand as his representative, to the production in evidence of facts learned in a professional capacity

by one physician, could not be construed as consent to the divulging of other confidential communications to other physicians. The court, upon the plaintiff's objection, excluded offered testimony of one Carney and of one Craw, witnesses for the defendant, the offered evidence having relation to declarations of the insured. The testimony of Carney was contained in his deposition. He deposed that at some time not definitely stated, but which was more than two years and a half before the application, the insured used the words, "This damned asthma." This witness testified that he did not know of whom the insured was speaking.

The witness Craw had testified that he was in the employment of the insured from about the 1st of February, 1877, until the 15th of December, 1878. The defendant offered to prove by him "that Mr. Wiler, on different occasions during the time named during which the witness was in his employ, and before this application was made to the company for a policy of insurance, stated to the witness that he had the asthma and suffered from it."

It was not shown, and it was not proposed to show, in either instance, on what occasion or under what circumstances, the words were used, and no accompanying fact was shown or offered in evidence. This policy during the life of the insured after its execution, as well as after his death, was a chose in action owned by the plaintiff as her separate property. Without her joining, her husband could not assign it: *Pence vs. Makepeace*, 65 Ind., 345; *Godfrey vs. Wilson*, 70 Ind., 50.

The declarations of the insured, uttered at such long intervals before the making of the application, and not shown to have been parts of the *res gestæ* of any acts or facts indicating a diseased condition of the insured which the declarations tended to explain, could not prove or tend to prove the fact of his ill health, but constituted mere hearsay, and as such were not amissible against the plaintiff, to show a breach of warranty: *Swift vs. Mass. Mut. Life Ins. Co.*, 63 N. Y., 186; *Eddington vs. Mut. Life Ins. Co.*, 67 N. Y., 185; *Dilliber vs. Home Ins. Co.*, *supra*; *Mut. Life Ins. Co. vs. Applegate*, 7 Ohio St., 292; *Hurd vs. Masonic Mut. Benefit Soc.*, 6 Ins. Law Jour., 792; *Mobile Life Ins. Co. vs. Morris*, 3 Leo., 101; *May on Ins.*, Sec. 214; *Bliss Life Ins.*, Sec. 371 et seq.

Amongst the questions and answers in the application were those mentioned above as being shown in the fifth paragraph of answer. It is insisted that the verdict was contrary to the evidence;

especially, that the evidence proved that the applicant had had only seven full brothers.

The attention of the court and that of the jury were given particularly to this question. The court instructed the jury that if it appeared upon the application that the applicant stated therein that he had had eight full brothers, and if the jury believed from the evidence that he had had, in fact, only seven full brothers, it would be their duty to find for the defendant.

The attention of the jury was further directed to this matter by an interrogatory, in answer to which they found specially that, at the making of the application, the applicant had had eight full brothers.

The court's attention was again called to the matter by the motion for a new trial, assigning as one of the causes the insufficiency of the evidence.

The burden of proof, as to this question was upon the appellant. It is manifest that to justify this court in setting aside the conclusion thus reached in the trial court, the evidence should be such as to establish the appellant's impeachment of the truth of the applicant's answer in question, without any contradiction or any uncertainty whatever. As the evidence appears upon the record, considered in all its parts, it seems to us that the jury might well have found from it that the applicant had had only seven full brothers. But the jury were to proceed upon the assumption that the applicant told the truth, until the contrary was proved to their satisfaction.

It was for the jury to consider the appearance and manner of the witnesses, and to determine the trustworthiness of their memories. Two witnesses, a brother and a sister of the applicant, testified upon this question.

Their testimony upon paper shows that they were somewhat confused in their memories, and the testimony of neither was in all respects consistent in itself.

As requested by counsel for the appellant, the evidence upon this question has been examined by all of us, and, after careful consideration, it has been determined that we ought not to interfere with the conclusion reached in the trial court.

PER CURIAM.

It is ordered upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellant.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

*In Error to the Supreme Court of Illinois.*CHICAGO LIFE INS. CO., *Plaintiff in Error,*

vs.

THOMAS B. NEEDLES, AUDITOR OF PUBLIC  
ACCOUNTS OF THE STATE OF ILLINOIS.\*

The Illinois statute of 1869 requires the auditor to compel life companies whose reserve is below the standard to suspend new business and also provides that he shall institute proceedings in the courts to suspend or prohibit the company from doing further business, in case of apparent insolvency, or when such action is needed for the protection of the insured. The law was enforced against a life company doing business under a special charter granted previous to the act.

*Held*, That the State had a reserved right to pass such subsequent laws as might be needed to prevent the privileges granted in the charter from being abused. The condition is implied that the company shall be subject to such reasonable regulations as the legislature may enforce.

*Held*, That the State enactments do not impair the obligation of the company's contracts within the meaning of the constitution of the United States.

HARLAN, J.

By an act of the General Assembly of Illinois, approved February 16, 1865, certain named persons were created a body politic and corporate by the name of the Traveller's Insurance Company, with authority to carry on the business of insuring persons against the accidental loss of life or personal injury sustained while traveling by railways, steamers, and other modes of conveyance. Subse-

\* Decision rendered, March 2, 1885



quently, by an act approved February 21, 1867,—the provisions of which were formally accepted by the company,—its name was changed to that of the Chicago Life Insurance Company, and it was invested with power to make insurance upon the lives of individuals, and of persons connected by marital relations to those applying for insurance, or in whom the applicant had a pecuniary interest as creditor or otherwise; “to secure trusts, grants, annuities, and endowments, and purchase the same, in such manner, and for such premiums and considerations as the board of directors or executive committee shall direct.” That, as well as the original act, was declared to be a public act, to be liberally construed for the purposes therein mentioned.

A general law of the State, approved March 26, 1869, and which took effect July 1, 1869, entitled “An act to organize and regulate the business of life insurance,” provides (§ 10): “When the actual funds of any life insurance company doing business in this State are not of a net value equal to the net value of its policies, according to the ‘combined experience,’ or ‘actuaries’ rate of mortality, with interest at four per centum per annum, it shall be the duty of the auditor to give notice to such company and its agents to discontinue issuing new policies within this State until such time as its funds have become equal to its liabilities, valuing its policies as aforesaid. Any officer or agent who, after such notice has been given, issues or delivers a new policy from and on behalf of such company before its funds have become equal to its liabilities as aforesaid, shall forfeit, for each offense, a sum not exceeding one thousand dollars.” The same statute requires, among other things, every life insurance company incorporated in Illinois to transmit to the auditor, on or before the first day of March, in each year, a sworn statement of its business, standing, and affairs, in the form prescribed or authorized by law and adapted to its business; empowers that officer to address inquiries to any company in relation to its doings or condition, or to any other matter connected with its transactions, to which it was required to make prompt reply; and makes it his duty to make, or cause to be made, an examination of its condition and affairs, whenever he deems it expedient to do so, or whenever he has good reason to suspect the correctness of any annual statement, or that its affairs are in an unsound condition. The provisions relating to life insurance companies, incorporated in other States, and doing business in Illinois need not be here examined, or their effect determined.

By another general statute, approved February 17, 1874, in force July 1, 1874, it is provided as follows :—

"SEC. 1. If the auditor of State, upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded, or is exceeding, its corporate powers, he shall apply by petition to a judge of any circuit court of this State to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had, or otherwise, as he may direct. It shall be discretionary with such judge, either to issue said injunction forthwith, or to grant an order for such company, upon such notice as he may prescribe, to show cause why said injunction should not issue, or to cause a hearing to be had on complaint and answer, or otherwise, as in ordinary proceedings in equity, before determining whether an injunction shall be issued. He may in all such cases make such orders and decrees, from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain, or prohibit the further continuance of the business of the company."

"SEC. 5. When the charter of any such insurance company expires, is forfeited, or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, as hereinbefore provided, the court, on application of the auditor, or of a member, stockholder, or creditor, may, at any time before the expiration of said two years, appoint one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of State, and to collect the debts due, and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshaling, and distributing of the assets of the company, and the closing of its concerns; and, when necessary for the final settlement of its unfinished business, the powers of such receivers may be continued as long as the court deems necessary therefor."

"SEC. 9. The mode of summoning parties into court, the rules of practice, course of procedure, and powers of courts, in cases arising under this act, shall be the same as in any ordinary proceedings in equity in this State, except as herein otherwise provided."

Under the authority conferred by the latter statute, the auditor

caused an examination to be made by the chief clerk of the insurance department of the State, into the condition of this company. That officer reported that it had been doing a losing business for several years, was insolvent within the meaning of the statute, and that immediate steps should be taken to appoint a receiver, to the end that the affairs of the company be wound up as quickly as possible, as being for the best interests of its policy-holders. As the result of that examination, the present proceedings were commenced by the auditor in the Circuit Court of Cook County under the said act of 1874. The petition filed by him shows that, in his opinion, the condition of the company rendered its further continuance in business hazardous to the insured. He prayed that the company be enjoined from further prosecuting its business; that a receiver be appointed to take charge of its real estate and effects; and that such other relief be granted as should be meet. An injunction was issued, and a receiver appointed, with authority to take possession of the property of the company, the latter being directed to execute all conveyances necessary to vest in him full title to all its property, assets, and choses in action. The company, by its answer, put the plaintiff on proof of all the material allegations of the petition. At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was, that the statutes of the State, under which these proceedings were had, were in violation of the constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policy-holders and creditors.

This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the supreme court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the supreme court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the constitution of the United States.

But the final judgment necessarily involved an adjudication of that claim ; for, if the statutes upon the authority of which alone the auditor of State proceeded, are repugnant to the national constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States, has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied.

The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired if that company be held subject to the operation of subsequent statutes regulating the business of life insurance and authorizing the courts in certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business. This position cannot be sustained, consistently with the power which the State has, and, upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. The right of the plaintiff in error to exist as a corporation, and its authority in that capacity to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused or so employed as to defeat the ends for which it was established, and that when so abused or mis-employed, they may be withdrawn or reclaimed by the State, in such way and by such modes of procedure as are consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence : *Terrett vs. Taylor*, 9 Cranch, 51 ; *Angell & Ames on Corporations* (9th Edit.), § 774, note.

Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations in respect to the general conduct of its affairs as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct

the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created: *Sinking Fund Cases*, 99 U. S., 70; *Commonwealth vs. Farmers & Mechanics' Bank*, 21 Pick., 542; *Commercial Bank vs. Mississippi*, 4 S. & M., 503. If this condition be not necessarily implied, then the creation of corporations with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are entrusted. It would be extraordinary if the legislative department of a government charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide by reasonable regulations against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all.

In the present case it is claimed by the State that the Chicago Life Insurance Company was never solvent at any time after its original organization; that only ten per cent of its authorized capital stock was ever paid in; that stock subscription notes, representing unpaid subscriptions, were ingeniously made payable on demand, with interest after such demand, and that no demand having been made, no interest accrued; that, nevertheless, the verified reports of the company to the State indicated that its capital stock was fully paid up in cash, thus leading the public and the insured to believe that the stock was paid up and invested in interest-bearing securities; that large dividends were annually paid to stockholders from the earnings of the company, which, consistently with an honest exercise of its franchises and privileges, and with its duty to policy-holders, should not have been paid; that interest upon collateral securities deposited by stockholders owing subscriptions was received by the stockholders themselves; that the annual dividends paid to stockholders was in direct violation of the company's by-laws; that the annual reports to the auditor scheduled large amounts of assets and securities as the property of the corporation, when, in fact, they were the property of individuals; that such reports falsely magnified the receipts of the company and misstated its disbursements; and that its last annual report included, among its securities, about \$80,000 of mortgages which were not the property of the company. These statements, counsel for the State claim, are fully sustained by the evidence in the cause, while counsel for the company, with equal emphasis, contends

that the showing made is all that could be desired in a corporation managed by careful, honest directors.

We express no opinion as to the correctness of either of these opposing views; for they refer to matters that do not necessarily involve the validity of the statutes which, it is contended, violate the national constitution; they relate only to the manner in which the company has exercised its corporate powers, and do not involve any question of a federal nature. It is not competent under existing laws for this court to inquire whether the State court correctly interpreted the evidence as to the company's insolvency; nor whether the facts make a case which, under the statute of 1874, required or permitted a judgment perpetually enjoining it from doing any further business. We are restricted by the settled limits of our jurisdiction to the specific inquiry, whether the statutes themselves upon which the judgment below rests, impair the obligation of any contract which the company or its policy-holders had with the State, or infringe any right secured by the national constitution: *Railroad Co. vs. Rock*, 4 Wall., 180; *Knox vs. Exchange Bank*, 12 ib., 383. It is only as bearing upon the question of the power of the State—without any express reservation to that end having been made in the charter of the company—to subject it to such regulations as those established by the act of 1869, or to compel it to cease doing business when the circumstances exist which are set out in the act of 1874, that we have referred to the facts which counsel for the State contend are fully established by the evidence. If the State had no such power, then the statutes under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible that the State which brought this corporation in existence for the purpose of conducting the business of life insurance, is powerless to protect the people against it, when—assuming, as we must, the facts to be such as the judgment below implies—its further continuance in business would defeat the object of its creation, and be a fraud upon the public, and on its creditors and policy-holders? Did the company by its charter have a contract that it should, without reference to the will of the State, or the public interests, exercise the franchise granted by the State after it became insolvent and consequently unable to meet the obligations which, as a corporation under the sanction of the State, it had assumed to its policy-holders? Our answer to these questions is sufficiently indicated by what has been said. The act of 1869 does not contain any regulation respecting the affairs of any corporation

of Illinois which is not reasonable in its character, or which is not promotive of the interests of all concerned in its management. It only guards against mismanagement and misconduct ; its requirements constitute reasonable regulations of the business of such local corporations ; it does not impair the obligation of any contract which this company had with the State ; the conditions imposed upon the rights of the company to continue the issuing of policies are neither arbitrary nor oppressive.

The same general observations apply to the act of 1874, which, recognizing the contract right of the company to carry on business as a corporation, does not, by a legislative decree merely, based upon the *ex parte* representations of public officers, assume to withdraw that right. There is no denial as counsel supposes, of the equal protection of the laws, nor any deprivation of property without due process of law ; for that statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defense, may determine whether it is insolvent, or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law ; grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the State should be no longer enjoyed : *Terrett vs. Taylor*, *ubi supra* ; 2 *Kent's Com.*, 304, 312 ; *Slee vs. Bloom*, 5 *Johns. Chy.*, 379 ; *Com. vs. F. & M. Bank*, 21 *Pick.*, 542. See also *Angell & Ames on Corporations*, § 774 and note, 9th Ed. That a suit for such purposes might be instituted if, in the opinion of the auditor of State, any of those grounds existed, affords no justification to characterize this proceeding as harsh or arbitrary ; for, at last the final judgment of the court must depend upon the facts as established by competent evidence, and not upon the mere opinion of that officer. Indeed, the existence of such an opinion, upon the part of that officer, as a condition of his right to institute the proceedings prescribed by the act of 1874, is in the interest of the corporations embraced by its provisions ; for it furnishes some protection against hasty or oppressive action against them.

These views are strengthened by the company's acceptance of the amended charter granted in 1867. The fifth section of that act is in these words : "This act and the act to which this is an amendment shall not be deemed to exempt said company from the opera-

tion of such general laws as may be hereafter enacted by the general assembly on the subject of life insurance." That section may not be equivalent to a reservation of the right of the legislature to alter, amend, or repeal the original charter at pleasure; and, if it be admitted that the company, prior to that amendment, could not have been subjected to the regulations prescribed by the acts of 1869 and 1874, yet it was entirely competent for it to waive—as, by its acceptance of the amended charter, it did waive—any such exemption, and, in consideration of the grant of additional powers, or without any consideration of that character, agree to come under the general laws on the subject of the business in which it was engaged, which did not materially impair its right to carry on that business, or take from it any substantial privilege conferred by the original charter. It took the additional rights given by the act of 1867, subject to the condition imposed by its fifth section.

It is further contended that the State enactments in question impair the obligation of the contracts which the company has made with its creditors and policy-holders. To this it is sufficient to reply, in the language of this court in *Mumma vs. Potomac Co.*, 8 Peters, 283, where it was said: "A corporation, by the very terms and nature of its political existence, is subject to dissolution by surrender of its corporate franchises, and by a forfeiture of them for willful misuse and non-use. Every creditor must be presumed to understand the nature and incidents of such a body politic, and contract with reference to them. And it would be a doctrine new in the law, that the existence of a private contract of the corporation should force upon it a perpetuity of existence contrary to public policy, and the nature and objects of its charter." The contracts of policy-holders and creditors are not annihilated by such a judgment as was rendered below; for, to the extent that the company has any property or assets, their interests can be protected, and are protected by that judgment. The action of the State may or may not have affected the intrinsic value of the company's policies; that would depend somewhat on the manner in which its affairs have been conducted, upon the amount of profits it has realized from business, and upon its actual condition when this suit was instituted; but the State did not, by granting the original and amended charter, preclude herself from seeking, by proper judicial proceedings, to reclaim the franchises and privileges she had given, when they should be so misused as to defeat the objects of her grant, or when the company had become insolvent so as not to be able to meet the obligations which,



under the authority of the State it had assumed to policy-holders and creditors.

The whole argument in behalf of the company proceeds upon the erroneous assumption that this court has authority to determine whether the facts make a case under the statutes of 1869 and 1874, and if it be found they did not, that it must enforce the right of the company to continue in business, despite the final judgment to the contrary by the courts of the State which created it; whereas, we have only to inquire whether the statutes in question impair the obligation of any contract which the company has with the State, or violate any other provision of the national constitution. Being of opinion that they are not open to any objection of that character, the judgment must be affirmed without any reference to the weight of the evidence upon any issue of fact made by the pleadings.

Judgment affirmed.

## SUPREME COURT OF INDIANA.

NOVEMBER TERM, 1884.

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*Appeal from the Gibson Circuit Court.*

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CECELIA E. DAMRON

vs.

PENN MUTUAL LIFE INS. CO. ET AL.\*

In Indiana, in 1877, a married woman might, with the consent of her husband, make a valid assignment of a policy on the life of the husband, payable to her or her assigns.

In considering the validity of exceptions to conclusions of law, the findings on which they are founded must be considered as correct.

Where the consideration for an assignment was "value received," it may be shown what this value was.

A payment of the husband's debts, and agreement to look solely to the policy and pay the premiums, is a sufficient consideration for an assignment.

The statute of limitations does not run during the period embraced in such agreement.

BICKNELL, C. J.

This suit was commenced in March, 1884, and was taken by change of venue to the Vanderburgh Circuit Court, and thence to the Gibson Circuit Court, where a judgment was rendered for the appellees, from which this appeal was taken.

The appellant, the widow of Uriah G. Damron, brought the suit against the said insurance company, upon its policy of insurance on the life of her said husband for \$2,500, executed on January 3d, 1876, and payable to the appellant. The appellees, Cook, Dieterle,

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\* Decision rendered, January 8th 1885.

Noel, and Pitcher were made defendants as claiming some interest in the policy under an assignment. The complaint alleged that said assignment was void, because of the plaintiff's coverture, and prayed for judgment on the policy.

The insurance company paid into court the amount due on the policy, to await the result of the litigation between the plaintiff and the other defendants, and was thereupon discharged from further liability. The issues joined were submitted to the court for trial, and the court made a special finding of the facts, and stated conclusions of law thereon in favor of the appellees, to which conclusions the appellant excepted.

The appellant has assigned several errors, but in her brief has discussed only the alleged errors in the conclusions of law, and has presented for consideration the following question only :—

1. Was the assignment of the policy by Mrs. Damron valid ?
2. Is the statute of limitations of six years a bar to the accounts ?

The court found substantially that the policy of insurance on the life of the said Uriah G. Damron for \$2,500, payable within sixty days after notice and proof of his death to his wife, the appellant, her executors, administrators, or assigns, was executed by the said insurance company on April 30th, 1873, and that the annual premium payable thereon was \$126.25.

That when the policy was executed said Damron and wife were residents of Evansville, Indiana, and said insurance company was a corporation of Pennsylvania doing business in Indiana.

The said Uriah Damron afterwards became indebted to Henry A. Cook, \$1,015.60, and to John Dieterle, \$154.30, and to William Noel, \$164, and to Henry C. Pitcher, \$400 ; and that afterwards, on February 9th, 1877, said Damron and wife, being then residents of Illinois, and Henry A. Cook, a resident of Indiana, and said Damron being still indebted as foreshaid, and said Cook being his surety in the further sum of \$200 and interest at 10 per cent since August 12, 1876, said Damron and wife indorsed upon said policy of insurance the following assignment thereof to said Henry A. Cook.

“ McLEANSBORO, ILLINOIS, February 9th, 1877.

Policy, No. 14791.

For value received, we hereby assign, transfer and set over all our

right, title, and interest whatsoever, of, in, and to policy No. 14791, on the life of Uriah G. Damron in the Penn Mutual Life Insurance Company, of Philadelphia, to which this assignment is attached, into Henry A. Cook, Esq., of Evansville, Ind., in trust: First, to pay himself and John E. Dieterle and William J. L. Noel and Henry C. Pitcher, of Mount Vernon, Indiana, on account of U. G. Damron any indebtedness to them or either of them, existing when the policy becomes a claim. Secondly, to pay the remainder, if any, to Mrs. Cecelia E. Damron, wife of the insured, her executors, administrators or assigns, with full power to said trustee to surrender said policy to the said company, if said company consents thereto for paid-up insurance, and without any liability on the part of said company to see to the proper discharge of the trust, or of any part thereof.

Witness our hands and seals the day and year above written.

(Signed)

URIAH G. DAMRON,  
CECELIA E. DAMRON.

Witnesses present,

GEO. PHILLIPS.  
FRANK RITCHIEY,

Approved and recorded 16th day of March, 1877, without guarantee on the part of the company as to the sufficiency or validity of the transfer. Entd. B. 2, page 240. James Weir Mason, actuary."

And on said day said Cecelia, with the consent of her husband, delivered said policy to the said Henry A. Cook. That at the time of said assignment the said Uriah was without means to pay his debts or the premiums on the policy. That said Cook agreed, as the consideration for said assignment, to and with the said plaintiff and the said Uriah, that he, Cook, would pay or cause to be paid all premiums upon said policy as they became due, and would not in any way press the said Uriah in his lifetime for the collection of said debts or for the collection of any sum he might be compelled to pay for the said Uriah as his surety, but would give time on all such debts until the death of said Uriah, and upon his death would look solely to the proceeds of said policy for the payment of any sum that might be due him on account thereof, when said policy became a claim against the company. Said Cook also agreed to and with the plaintiff and said Uriah, that after paying himself, John Dieterle, William Noel, and Henry C. Pitcher the indebtedness that might be due them or either of them when said policy became a claim on ac-

count of said Uriah, that he would pay the excess, if any, collected by him on said policy to the said Cecelia E. Damron.

That after the execution of said assignment, said Cook in April, 1877, paid, as surety for said Uriah, the sum of \$217.50, and never pressed him in his lifetime for the payment of any of the foregoing indebtedness.

That said Cook also paid as premiums on said policy the sum of \$653.65, of which \$29.68 were repaid him by said Pitcher, and \$10.42 were repaid him by said Dieterle; that no part of any of the indebtedness aforesaid of said Uriah has ever been paid to said Cook, Dieterle, or Pitcher, but that said Noel's claim should be credited with \$100 on account of a gold watch and chain received by him from said Uriah in 1876.

That at the date of said assignment there was a statute of the State of Illinois as follows: "A married woman may own in her own right real and personal property obtained by descent, gift, or purchase, and mortgage, sell, and convey the same to the same extent and in the same manner that the husband can property belonging to him." At the time of said assignment it was also the law of Illinois that a life insurance policy on the life of a husband, payable upon his death to his wife, is her sole and separate property, and she may sell and assign it, or pledge it as security for her husband's debts, and an assignment by her for that purpose will be binding upon her, and she cannot repudiate it after the death of her husband.

After said assignment, said Uriah removed to Mount Vernon, Indiana, and became a resident there, and died there on May 28th, 1883. Due proof was made of his death, the full amount due from said insurance company on said policy and paid into court was \$2,429.33.

There is due said Henry Cook on account of premiums paid \$766.15, including interest at six per cent.

There is due on account of the premiums paid by Henry C. Pitcher, including interest, \$41.08.

There is due the said John Dieterle for premiums paid and interest, \$14.47.

There is due the said Henry A. Cook on the indebtedness aforesaid other than for premiums paid, \$1,962.60, of which \$558.95, was due on open account on January 1, 1877, for goods sold in 1876.

There is due said John Dieterle on open account, \$70.35, and the indebtedness to him, not including the premiums paid by him, is \$178.56.

The indebtedness to the said William Noel is \$93.44.

There is due to the said Henry C. Pitcher, not including the premiums paid by him, \$400, and he, before the death of said Uriah executed a written assignment of all his interest in said policy to the plaintiff, Cecelia E. Damron, and delivered the same to the said Henry A. Cook. Upon the foregoing facts, the court stated the following conclusions of law :—

First. The assignment of said policy is valid and binding as against the said Cecelia E. Damron.

Second. At the commencement of this suit said Henry A. Cook was lawfully in possession of said policy and was authorized to collect the same.

Third. That the sums of money due as aforesaid upon open account are not barred by the statute of limitations.

Fourth. This conclusion states that the sum of \$2,429.33, paid into court as aforesaid, should be distributed to the said Cook, Dieterle, Noel, and Cecelia Damron in proportion to the amount of their claims aforesaid, stating the sums to be paid to each.

Fifth. That the plaintiff, Cecelia E. Damron has no interest in said policy or in the money paid into court, except as the assignee of the interest of said Henry C. Pitcher. A policy of insurance is a chose in action governed by the same principles applicable to other agreements involving pecuniary obligations.

The present policy was payable to the appellant, her executors, administrators, or assigns. It was therefore intended to be assignable.

In *Hudson vs. Merrifield*, 51 Ind., 24, this court said :—

“The party holding and owning such a policy, whether on the life of another or on his own life, has a valuable interest in it, which he may assign, either absolutely or by way of security, and it is assignable like any other chose in action.”

In *Pence vs. Makepeace*, 65 Ind., 345, it was held that an insurance policy issued upon the life of a husband for the benefit of his wife, is her property, and an effectual assignment and delivery

thereof to another, even during the lifetime of her husband can be made only by her."

In *Wilburn vs. Wilburn*, 83 Ind., 55, this court said:—

"In truth the policy is not the property of the insured in any sense, but is the property of the beneficiary from the day of its issue, for from that time he has the whole beneficial interest." See also *Harley vs. Heist*, 86 Ind., 196; *Bushnell vs. Bushnell*, 92 Ind., 503.

The interest of such a beneficiary, being personal property, a married woman, in Indiana, prior to the act of March 25th, 1879, acts of 1879, p. 160, could transfer such property with the consent of her husband. *Morcan vs. Branson*, 37 Ind., 195; *Baker vs. Armstrong*, 57 Ind., 189; *Paulman vs. Claycomb*, 75 Ind., 64.

But this power of the married woman was subject to the common-law rule that a feme covert cannot bind herself by an executory contract: *Mather vs. Shank*, 94 Ind., 501-505; *Parks vs. Barrowman*, 83 Ind., 561; therefore, where an assignment of such a policy was made by a married woman to secure her own executory contract, not binding upon her, it was held that the assignment itself was also invalid: *Godfrey vs. Wilson*, 70 Ind., 50. In some of the United States the power of a married woman in reference to the transfer of a policy of which she is the beneficiary, has been regulated and restrained by statutes, but there are no such statutes in Indiana.

In 1877, the only statutory restriction upon the wife's power to transfer her separate property was that the transfer must be made with her husband's consent. The rules forbidding a wife to incur her separate property as security, or from entering into any contract of suretyship are found in the acts of 1879, p. 160, and 1881, p. 528.

We think it very clear that in Indiana in 1877, a married woman had the power to make, with her husband's consent, a valid assignment of a policy of insurance taken on her husband's life for her benefit and payable to her and her assigns.

In considering the validity of exceptions to conclusions of law the findings upon which such conclusions are founded are taken to be correct. Defects in the findings are not reached by exceptions to the conclusions of law. *Williams vs. Osburne*, 95 Ind., 347. Under the findings in this case as to the law existing in Illinois, a married woman had also in Illinois in 1877, the power to make a valid assignment of a policy of insurance of which she was the beneficiary.

The consideration of the assignment in controversy is therein

stated as "value received." For value received the assignment is made to Henry A. Cook, in trust, etc.

In such a case it may be shown what the "value received" was. Even in a deed of real estate the true consideration may be shown by parol to be more or less than the amount recited and acknowledged in the deed to have been received: *McDill vs. Gunn*, 43 Ind., 315-319; 3 *Washburn on Real Property*, 327. So the true consideration of a note may be shown by parol, and the existence of a written agreement showing part of the consideration will not prevent the introduction of oral testimony as to the remainder: *Everhart vs. Puckett*, 73 Ind., 409, and see also *Hight et al. vs. Taylor*, 97 Ind., 392.

The findings in the present case show that the consideration of the assignment was,—

First. The payment of the husband's debts.

Second. The promise to forbear to proceed against Uriah G. Damron, and to look solely to the policy for the payment of the debts.

Third. The agreement to pay and the actual payment of the premiums on the policy.

The findings state a sufficient consideration: *Hubble vs. Wright*, 23 Ind., 322; *Ellis vs. Kenyon*, 25 Ind., 134; *Buck vs. Axt*, 35 Ind., 512; 1 *Parsons on Cont.*, 440-443.

There was no error in the conclusion of law that Mrs. Damron's assignment of the policy was valid.

And we think there was no error in the conclusion that the statute of limitations was not a bar to the items of account mentioned in the findings.

The appellant claims that "as the assignment was dated on February 9th, 1877, and the accounts were then due, and as this action was commenced in 1884," the accounts were then more than six years past due.

But under the agreement there was to be no proceeding against the debtor during his life, and he died in May, 1883. The statute was not running during the period embraced in that agreement, and besides, the plea of the statute of limitations is a personal privilege



to be asserted by the debtor only. We find no error in the conclusions of law.

The judgment ought to be affirmed.

PER CURIAM.

It is therefore ordered on the foregoing opinion that the judgment of the court below be, and the same is hereby, in all things affirmed at the costs of the appellant.

## SUPREME COURT OF IOWA.

—  
*Appeal from Davis Circuit Court.*  
—

EGGLESTON

vs.

COUNCIL BLUFFS INS. CO.\* )

Where property insured against loss by fire is described in the policy as located on "lots 7 and 8, in block 2, in the town of Floris," and there is no mistake as to the premises intended to be insured, but the property is in fact located on "lots 7 and 8, in block 2, of Harrington's Addition to the town of Floris," an action at law may be maintained on the policy without first proceeding in equity to reform it, and parol evidence will be admissible to explain the latent ambiguity as to the description of the property.

Where it is provided in a fire insurance policy that suit must be brought within six months after a loss, letters containing promises of payment, which induced plaintiff not to bring her action before the expiration of the six months, are not properly exhibits to be attached to the complaint, and when so made part of the pleadings should on motion be stricken out.

Where the answer sets up the expiration of the six months as a bar to the action, such letters are admissible in evidence to sustain the plaintiff's claim that the promises therein made caused the delay in bringing suit.

The provision in a fire insurance policy requiring written proofs of loss, may be waived by the agents of the company, and being so waived in the case at bar, the suit was not prematurely brought.

Where it can be shown that, without any fault or fraud on the part of the assured, it is impossible for him to procure written proofs of loss, he may recover without performing the condition of the policy requiring such proofs.

Where the agent of the insurance company had authority to take the risk, and he filled out the application on the premises which he had full opportunity to examine, his knowledge will be imputed to the company, and it will be estopped from claiming that the representations as to the construction and size of the premises were not true.

A letter written by the attorney of the assured to the company, not in response to a communication from it, held improperly admitted in evidence, and, being calculated to prejudice the jury, ground for reversing the judgment.

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\* Opinion filed, December 9, 1884. From *Northwestern Reporter*.

Action on a policy of insurance against loss or damage by fire. Verdict and judgment for plaintiff. Defendant appeals.

PHILLIPS & DAY, for Appellant.

PAYNE & EICHELBERGER, for Appellee.

REED, J.

The property covered by the policy was a store-building and stock of goods. Plaintiff made a written application for the insurance, and a copy of this application was indorsed on the policy when it was issued. In the application the property to be insured was described as being "situate on and confined to premises now owned and occupied by me in lots 7 and 8, block 2, of Floris, Davis County, Iowa." In the policy the property insured is described as being "situated on lots 7 and 8, block 2, in Floris, Davis County, Iowa." One defense pleaded by the defendant was that the plaintiff had no title to or interest in lots 7 and 8, block 2, in the town of Floris, or in the building situated thereon, and that she had no interest in the property described in the application and policy. It was proven on the trial that plaintiff was a merchant doing business in said town of Floris, and that the building in which she did business was situated on lots 7 and 8, block 2, in Harrington's addition to said town. It was also proven that the policy was issued by an agent of defendant, who had authority to make the contract, and that before issuing it he visited the premises and made an examination of them, and that he filled out the application and wrote therein the description of the property, but obtained the information on which he wrote such description from plaintiff, or her son, who was acting for her at the time.

The title deeds under which plaintiff claimed the property described conveyed therein as lots 7 and 8, block 2, in Floris, but she and those under whom she claimed had been in actual and uninterrupted possession of the property occupied by her when the risk was taken for more than 10 years under a claim of ownership. It was also shown that there is a block 2 in the original plot of the town, and that there are lots in that block which are numbered 7 and 8. The circuit court, in an instruction to the jury, ruled that plaintiff was entitled to recover, notwithstanding the fact that the property was situated in said addition, if the agent who took the risk knew where it was situated in fact, and intended to insure the building actually occupied by plaintiff, and the goods therein, and was not misled by the description. And in disposing of a motion by defend-

ant for judgment on the special findings of the jury that the property owned by the plaintiff was not situated in the original town, but in the addition thereto, the court made substantially the same ruling. This holding is the ground of the first exception argued by counsel for defendant.

The position is not that the policy is necessarily rendered void by the alleged error in the description of the property, but that, as by its terms it covers property entirely different from that intended by the parties to be included in it, there can be no recovery upon it at law until by the judgment of a court of equity it has been so reformed as to express the real intent and meaning of the parties. The evidence leaves no doubt as to what the real intention of the parties was.

Plaintiff's store-building was situated on the lots in Harrington's addition, and she desired to obtain insurance upon it and upon the stock of merchandise which she kept in it. Defendant's agent went to that particular building and made an examination of the premises with the view of insuring the building and the stock of goods in it; and when he issued the policy he had that property in mind, and supposed he was insuring it; and when plaintiff received the policy she understood that it covered that property. It is now assumed by defendant that the policy covers other and entirely different property, and, if this be true, its position that there can be no recovery in an action at law until there has been a reformation of the contract is also probably correct: *Wood, Ins.*, § 95; *Holmes vs. Charlestown Mut. F. Ins. Co.*, 10 Metc., 211; *Ewer vs. Washington Ins. Co.*, 16 Pick., 502. But we think defendant is not warranted in this assumption. Whatever of ambiguity or uncertainty there is in the description of the property is created by the words used as description of the lots and block upon which it was situated. In every other respect the description is certain and clear. Considering the description in the application, and that in the policy together, and omitting the number of the lots and block, the property described with certainty is the one-story, frame store-building in the town of Floris, owned and occupied by plaintiff, and the stock of merchandise kept by her therein. But defendant's position is that the words "lots 7 and 8, in block 2, in the town of Floris," is certainly descriptive of property situate in the original plat of the town. But we think this is not true. The addition is as certainly part of the town as is the land covered by the original plat, and lots 7 and 8, in block 2, in the addition, are in the town as certainly as the lots of corresponding

numbers in the original plat. The description is simply uncertain. It does not with certainty describe property in either the addition or the original plat. There is a block 2 both in the original plat and the addition, and there are lots numbered 7 and 8 in each of said blocks, and they are each in the town of Floris. The description "lots 7 and 8, in block 2, in the town of Floris," without more, is therefore uncertain in this, that it does not designate whether the particular lots intended are those in the addition which are so numbered or those of the corresponding numbers in the original plat; and this uncertainty was made apparent when it was shown that there was an original plat and an addition, and there were lots in each of corresponding numbers. There is a latent ambiguity, then, in the description of the property contained in the policy, and it may be explained by parol in an ordinary action: *Bowman vs. Agricultural Ins. Co.*, 59 N. Y., 521; *Wood, Ins.*, § 95; 2 Pars. Cont., 558.

2. The policy provides that no suit or action thereon shall be sustained unless commenced within six months after the occurrence of the loss, and that if any suit should be commenced thereon after the expiration of six months from the date of the loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. The loss in question occurred on the twenty-first of February, 1883, and the suit was instituted on the third of September of the same year. Plaintiff alleges in her petition that at different times during the first six months after the loss occurred the agents and officers of defendant, in conversation and in letters written to her and to her attorneys, represented and promised that her claim would be paid, and that, believing and relying on these representations, she was induced to forbear the bringing of any suit for the enforcement of her claim until after the expiration of six months from the date of the loss. Attached to the petition as exhibits were a number of letters which, it was claimed, passed between the parties during that period. Defendant moved the court to strike out these exhibits and the allegation making them parts of the petition, on the ground that they were mere matters of evidence, and were not necessary or proper parts of the pleading. This motion was overruled. We think it should have been sustained.

Conceding that it was necessary for plaintiff to allege and prove that she was induced to forbear bringing the suit within the six months by the representations and promises of defendant, she was required to allege in the pleading only the ultimate fact. The let-

ters constituted but a portion of the evidence by which the allegation would be proven, and it was wholly unnecessary to set them out in the pleading ; but we cannot say that defendant was in any manner prejudiced by the overruling of the motion to strike them out. We will, therefore, not disturb the judgment on this ground.

3. Defendant set out the provision of the policy with reference to the time within which suit might be brought thereon in its answer, and alleged that plaintiff's right to maintain the action was barred thereby. The parties appear to have tried the case on the theory that unless plaintiff was induced by some promise or representation of defendant to forbear instituting the suit within six months from the date of the loss, her right of action was barred by this provision. The letters which were attached to the petition were offered in evidence by plaintiff. Defendant objected to them as incompetent and immaterial, but the objection was overruled, and they were read in evidence. We think the ruling was correct. The letters had some tendency to establish plaintiff's claim that she had been induced, by promises and representations of defendants, to delay the institution of the suit.

4. It is provided in the policy that defendant will pay any loss or damage which may happen to the insured property during the life of the policy "sixty days after due notice and proofs of the same shall have been made by the assured, and received at the home office of the company, in accordance with the terms and conditions of the policy." It is provided by another provision that "persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon ; also, the actual cash value of the property, and their interest therein ; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss ; and when and how the fire originated ; \* \* \* and shall also produce their books of account and other vouchers, and exhibit the same for examination, and permit copies thereof to be made ; and shall also produce certified copies of all bills and invoices, the originals of which have been lost."

Plaintiff alleges that immediately after the fire she gave notice of the loss to defendant, and that a few days thereafter it sent its gen-

eral agent to examine into the loss and adjust the same, and that said agent made an examination into all the circumstances of the fire, and that she then gave him full information as to the ownership of the property destroyed, and all matters pertaining to the loss and gave him an invoice of the goods in the building at the time of the fire, and that the agent then and there waived the provision of the policy which requires written proof of the loss to be made, and promised and agreed that when she procured from the wholesale dealers with whom she dealt invoices and bills of the goods which she had in the building at the time of the fire, and sent the same to defendant, it would pay the loss. She also alleges that afterwards, in the month of May, as a matter of precaution, she made out and sent to defendant complete and formal proofs of the loss as required by the terms of the policy. Defendant denied these allegations, and alleged that the proofs of the loss required by the policy were not made until the thirteenth of July, and that, as the suit was instituted less than 60 days from that date, no right of action had accrued when it was begun.

There was evidence given on the trial tending to prove the alleged waiver of the provision requiring written proofs of the loss, and it was proven that on the twenty-third of May plaintiff prepared and sent to defendant her affidavit in which some of the matters were shown which, by the provision of the policy, were required to be shown by the proofs of loss, and that defendant's adjusting agent, on the ninth of July, wrote to plaintiff's attorneys, and pointed out several particulars wherein he claimed said affidavit was insufficient as a proof of loss. And on the thirteenth of July plaintiff's attorneys prepared and sent to defendant additional proofs, to which it does not appear that any exception was taken. Defendant contends that "due notice and proof" of the loss were not made until the last proofs were received by it, and that as the suit was instituted less than 60 days from that date, it was prematurely brought. But the jury found specially that the provision was waived by the adjusting agent who made the examination soon after the occurrence of the fire, and this was on the 6th of March, so that if a right of action has accrued at all in plaintiff's favor, it accrued not later than sixty days from that date. That the provision of the policy requiring written proofs of the loss to be made may be waived is well settled by the authorities. See *Wood, Ins.*, §§ 414, 496; *Lycoming Fire Ins. Co. vs. Dunmore*, 75 Ill., 14; *Patterson vs. Triumph Ins. Co.*, 64 Me., 500.

5. Plaintiff does not claim that the provision of the policy under which she may be required to furnish certified copies of all bills and invoices, the originals of which were lost, was waived, but on the contrary alleges that she agreed to procure such copies from the wholesale merchants from whom she had purchased the goods, and forward the same to defendant. The evidence shows that she made efforts to procure these bills, but was able to procure but a portion of them, and the jury found specially that she furnished them so far as it was in her power so to do. Defendant contends that plaintiff's right to recover at all is dependent on a literal compliance by her with this provision of the policy. But we think she is not required by the provision to perform an impossible thing, and if it can be shown that, without any fault or fraud on her part, compliance is rendered impossible, she may recover without performing the condition: *Wood, Ins.*, § 423; *Bumstead vs. Dividend Mut. Ins. Co.*, 12 N. Y., 81; *O'Brien vs. Commercial Fire Ins. Co.*, 63 N. Y., 111. The jury found specially that plaintiff had furnished copies of the bills and invoices so far as it was possible for her to do so, and this finding is conclusive of the question.

6. The application contained statements with reference to the size of the building insured, the manner of its construction, the material of which it was constructed, and the time when it was built; and it is provided in the policy that the application shall be considered as a warranty by the assured. It was shown upon the trial that these statements, in some respects, were not true. The circuit court instructed the jury that the application was to be regarded as part of the contract and that the statements therein were warranties, and if any of said statements were not true when made, this would defeat a recovery by plaintiff on the policy, unless defendant had knowledge when it issued the policy that the statements were not true. But if defendant's agent, who solicited the insurance, had authority to take the risks, and he filled out the application, and was present on the ground and viewed the premises, and had an opportunity to examine them, and then knew the location of the building, and its size, and the material of which it was constructed, and the manner of its construction, his knowledge in this respect would be imputed to the company, and it would now be estopped from claiming that said representations were not true. Exception is taken by defendant to the last proposition contained in the instruction; but it is in accord with the rule on the subject as laid down by this court in *Jordan vs. State Ins. Co.*, 19 N. W. Rep., 917; *Williams vs. Niagara Fire Ins*



Co., 50 Iowa, 568 ; and *Miller vs. Mutual Benefit L. Ins. Co.*, 31 Iowa, 223.

7. Plaintiff was permitted, against defendant's objection, to introduce in evidence a letter to defendant, written by her attorneys, and which accompanied the proofs of loss which were sent July 18th. This letter was in no sense an answer to any communication from defendant. In it the writer expresses the opinion that plaintiff's claim is a just one, and that her loss was an honest loss. It is also stated in the letter that plaintiff had learned with satisfaction that defendant has paid a portion of the amount of the loss to one of her creditors to whom she had directed it to be paid. We think it very clear that this letter should have been excluded. It was incompetent for any purpose, and its admission could hardly have been otherwise than prejudicial to defendant. If defendant had in fact paid a portion of the loss to plaintiff's creditors on her order, this would have been an admission by it of the validity of the claim. And the statement in the letter was well calculated to create the impression in the minds of the jurors that this has been done. The expressions of opinion by the writer of the letter were equally objectionable. For the error in admitting this letter in evidence the judgment of the circuit court must be reversed.

SUPREME COURT OF CALIFORNIA.

McCORMICK ET AL.

vs.

SPRINGFIELD F. & M. INS. CO.\*

An insurance was effected by the plaintiffs on a stock of goods, the property of a corporation in which they were stockholders, and which goods they were holding as security for advances; their application described the property as their own; the policy referred to the application, and made it a part thereof, and all statements therein warranties, and provided that if the assured were not the sole, absolute, and unconditional owners of the property insured, and such interest were not truly stated in the policy, then, and in every such case, the policy should be void. *Held*, That the policy was void, and that the insurers were not estopped to deny its invalidity, because they did not assert the same immediately after the fire, when they discovered the true nature of the plaintiff's interest.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

WILLIAM M. PIERSON, *for Appellant.*

JOHN H. DICKINSON, *for Respondent.*

McKINSTRY, J.

The policy of insurance on which this action was brought, contains the covenants:—

“If the assured is not the sole, absolute, and unconditional owner of the property insured, \* \* \* and the interest of the assured be not truly stated in the policy \* \* \* then, and in every such case this policy shall be void.

\* Opinion filed, January 19, 1885. From *West Coast Reporter*.

"If an application \* \* \* is referred to in this policy \* \* such application \* \* shall be considered a part of this policy and a warranty by the assured, and if the assured, in a written or verbal application, makes any erroneous representation \* \* then and in every such case this policy shall be void."

The plaintiff's application for the insurance was "on their stock of manufactured manilla paper, while contained in the round, brick warehouse in the rear of their paper mill building," etc.

The evidence showed that the insured property was the property of the Lick Paper Company, "a corporation; that the plaintiffs were stockholders of the Lick Paper Company to the extent of one-half of the capital stock, and that they held a power of attorney representing the other half; that plaintiff McCormick was president, and plaintiff Delanoy was secretary of the corporation; that the plaintiffs were commission merchants, and sold the product of the corporation on a commission of five per cent, and that they held such product as security for advances made by them to the corporation, which advances varied from time to time, and at the time of the loss they amounted to about twenty thousand dollars.

And it further appeared that the corporation at the time of the loss was solvent, and plaintiffs had other security for their advances.

On this evidence the defendant moved for a nonsuit, on the ground that the evidence showed "that plaintiffs were not the sole, or absolute, or unconditional owners of the property insured, and the nature of their interest did not appear either in their application for insurance nor in the policy itself."

The court below erred in denying the motion for nonsuit.

The most that can be claimed on the part of the respondents is, that they were stockholders in the corporation that owned the insured property, and that they were also commission merchants holding the property as security for advances.

Under neither of these aspects, nor both combined, were they the "sole, absolute, and unconditional owners of the property insured." Their application and the policy, however, represented them to be such owners. The contract between the appellant and respondents provided, that if they were not such owners, and their interest should not be truly stated in the policy, then the policy should be void.

The civil code provides, sec. 2,611: "A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise, the breach of an immaterial provision does not avoid the policy."

The same code, sec. 2,607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk as a fact, is an express warranty thereof."

The policy makes the representation as to the ownership of the property a warranty. If it should be conceded that plaintiffs had an insurable interest, that fact would have no effect upon the determination of the question here presented. The statement in the application of plaintiffs that the property was "their" property, is a statement that they were only, absolute, and unconditional owners of it: *Southwick vs. Atlantic F. & M. Ins. Co.*, 133 Mass., 457; *Lasker vs. St. Joseph F. & M. Co.*, 86 N. Y., 424; *Mers vs. Franklin Ins. Co.*, 68 Mo., 127; *Rohrback vs. Germania F. Ins. Co.*, 62 N. Y., 47.

It is contended by respondents that the defendant "waived" the warranty, or is estopped from asserting that plaintiffs were not the only, absolute, and unconditional owners of the property, by reason of facts occurring after the fire.

The facts, claimed to be established by the evidence, on which respondents rely as proving such "waiver" or estoppel, may be stated as follows:—

On the day after the fire, Mr. Easton, of Jacobs & Easton (general agents of defendant), and Mr. Fenn their adjuster, called at the office of plaintiffs and looked over the inventory of what stock they had on hand. On the day following, the plaintiff McCormick gave to Fenn a memorandum of property destroyed, and assisted him in ascertaining the loss. Easton and Fenn were told the exact conditions under which plaintiffs held the paper, and that the Lick Paper Company at that time owed plaintiffs twenty thousand dollars. They were told that the property was held on consignment. Fenn, who was authorized to act for J. & E., afterwards asked one of plaintiffs to come to the office of Jacobs & Easton to be settled with. The only question in dispute, before the commencement of the action, was the amount of the loss—appellant claiming it was not bound to pay for "paper bags," but offering to pay all else, and respondents claiming that paper bags were covered by the policy. An affidavit, prepared by appellant's agent, was at their request signed and sworn to by plaintiff McCormick, on July 11th, four days after defendant knew the nature of plaintiff's interest in the property, which stated that he and his partner were stockholders in the Lick Paper Mill Company, one being its president and the other its secretary. That they were the agents of the company, making advances to it and receiving, as security therefor, the manufactured article; that the manu-

factured paper was stored in the company's warehouse (where the fire took place), until such time as McCormick & Delanoy could place it in the market; that such advances were made upon the report of the superintendent of said mill; that the quantity of paper was manufactured and is contained in said warehouse, etc. (proceeding with a full statement of plaintiffs' interest in and relation to the property).

The facts above recited did not constitute an estoppel upon defendant. "To constitute an estoppel there must be such conduct on the part of the insurers as would, if they were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it. \* \* \* Where no act has been done or left undone by the insured in reliance upon the action or non-action of the insurer, there can be no estoppel." *May on Ins.*, 507; *Security Ins. Co. vs. Fay*, 22 Mich., 467.

The facts above recited could not and did not induce the plaintiffs to take any action to their own prejudice. As to waiver, the policy contains an express covenant that no officer of the company defendant shall be held to have waived any of its terms and conditions, unless the waiver shall be indorsed thereon in writing.

**Judgment and order reversed and cause remanded for new trial.**

**MORRISON, C. J., and McKEE, J., concurred.**

## SUPREME COURT OF MICHIGAN.

ENGLISH

v.

FRANKLIN FIRE INS. CO.\*

The policy was on household goods, furniture, clothing, etc., "all contained in his two-story, frame dwelling-house etc.," and also in another clause, on his horse, buggies, hay, etc. Much of the household goods was afterwards removed to the barn and stored there at the time of the fire on account of a previous fire which rendered the house uninhabitable.

*Held*, That the policy did not cover the household furniture while in the barn.

*Held*, That knowledge of the removal by the company was not a waiver of the policy as to location, nor was the company called upon to cancel the policy in view of such knowledge to avoid liability.

TARSENEY & MEADOCK, *for Plaintiff and Appellant.*

HANCHEFF & STARK, *for Defendant.*

COOLEY, C. J.

Defendant, in January, 1883, issued to plaintiff a policy whereby he was insured to the amount of \$2,000 on his household goods, furniture, clothing, etc., "all contained in his two-story, frame dwelling-house and additions, occupied, as a residence," in Saginaw city, and to the further amount of \$300 on his horse, buggies, hay, etc., and barn tools. A fire occurred, November 13, 1883, which so far injured the house as to render it uninhabitable. At the time of this fire much of the household goods covered by the policy was removed to the barn and stored there. The parties adjusted the loss by this fire, and no question now arises upon it. December 6, 1883, the barn was burned, and with it the household

\* Decision rendered, Nov. 19, 1884.

goods stored in it. Defendant adjusted and paid the loss by this fire so far as concerned the property commonly kept in a barn, but refused to pay any loss on household goods. For that loss this suit is instituted. The circuit judge held there could be no recovery, and defendant had judgment. It is claimed for the plaintiff that the barn in this case may be considered a part of the dwelling-house, it being within the curtilage. But there is no ground for this claim. This is a case of contract, and the question is what contract the parties have made. For some purposes the law regards a barn within the curtilage as part of the dwelling-house; but it is not popularly so regarded, and it must be very rare indeed that in a contract it is treated as such. It certainly was not so treated in this case. There were two classes of insured property; and the class to which the goods in question belonged was insured as situated in a described building, which the policy designates as the dwelling-house; and the description makes it very clear that no other building was understood to be included. The parties certainly did not understand that in insuring the household goods, etc., in the dwelling house, and also horse, buggies, etc., and barn tools, that the horse, buggies, and barn tools were in the dwelling-house. But one of the conditions of the policy would make the meaning very plain if it could otherwise have been considered in doubt. The assured is required to "state on oath, in his proofs of loss, that all the merchandise and personal property for which claim is made was at the time of the fire contained in the building on premises described in said policy." It was plainly impossible for this plaintiff to state in his proofs of loss that the property for the burning of which he now claims was in "his two-story, frame dwelling-house and additions, occupied as a residence," for it was in a very different building.

A further claim is that defendant, knowing that these goods were stored in the barn, and not making any objection thereto, or canceling the policy on that account, has waived the right to take the objection when a loss has occurred. But this is not a case of objection and not a question of waiver. The question is, for what loss this defendant has undertaken to be responsible. Now we find the contract to be that defendant will be responsible for the loss by fire of these goods while they remain in the dwelling-house, but not when out of it. But the defendant could not insist that the goods should remain in the dwelling-house. Plaintiff might remove them at will, and for any reason that might incline him to do so; and,

this being his undoubted right, there would be nothing for defendant to waive in respect to it. Waiver implies a right to object to what is being done ; but there was no such right here. The defendant merely undertook for a certain responsibility while the goods were in the house ; and it was at the plaintiff's option to have them there or elsewhere, as he pleased. If they were lost by fire when elsewhere, the loss was not one against which the the defendant had undertaken to insure him. Nor was defendant called upon to cancel the policy by reason of the goods being removed from the building where they were insured. If the dwelling-house had been repaired, and the goods restored to it, the policy would again have covered them ; and this, for anything that appears to the contrary, may have been what both parties desired. At any rate, it does not appear that the plaintiff desired the policy canceled ; and if he had desired it, the cancelment would have been optional with defendant.

The cases of *Hartford Ins. Co. vs. Farrish*, 73 Ill., 166 ; *Annapolis etc. R. Co. vs. Baltimore Fire Ins. Co.*, 32 Md., 37 ; s. c. 3 Amer. Rep., 112 ; and *Bryce vs. Lorillard Ins. Co.*, 55 N. Y., 240, support the views here expressed, and are decisive.

The judgment must be affirmed.

The other justices concurred.



## UNITED STATES CIRCUIT COURT OF VERMONT.

HALE

vs.

CONTINENTAL LIFE INS. CO.\* )

When the question in a suit in equity, as shown by the bill, is whether the policy of the directors of an insurance company in declaring dividends has been lawful and right, and the defendant fails to answer this question after repeated allowances of exceptions for failure to answer the point, the orator is entitled to take the bill as confessed, so far as this point is concerned.

In Equity.

GILBERT A. DAVIS, *for Orator.*

CHARLES W. PORTER, *for Defendant.*

WHEELER, J.

The defendant has not yet answered and set forth its profits during the years in question out of which dividends were or might have been declared, nor any reason for not setting them forth. It has stated the policy of its directors in respect to dividends, and their reasons for adopting the policy which they did adopt ; but those matters were not what were required for answer, nor the subject of the exceptions. The defendant assumed to make profits from its assets derived from premiums paid by policy-holders, in which some or all of the policy-holders were entitled to participate by way of dividends, and the orator was among those so entitled. The answer and its amendments show that the directors made dividends, but does not show the amount of profits from which the dividends were made. To make such dividends there must have been an ascertain-

\* Decision rendered, May 23, 1894. From *Federal Reporter*.

ment of the profits of the company as a basis of the dividends. This basis, as ascertained by the directors, with the declaration of dividends by them, would or should be matters of record, and be very easy of statement from the records. It is not shown that there are not full and complete records in all these respects ready to be answered from. The course and policy of the directors may have been lawful and right, and may not. Whether so or not, is not the question now. The orator is entitled to a statement of the facts in the answer as a part of his case as made and charged by his bill. This statement is not forthcoming after repeated allowance of exceptions to the want of these plain and obvious facts. The exceptions are substantially the same as those allowed before, and under the sixty-fourth rule in equity the orator is entitled to take the bill, so far as the matter of these exceptions is concerned, as confessed.

The exceptions are again allowed, and leave to take so much of bill as confessed, granted.

## LOWER COURT DECISIONS.

### SUBROGATION.—NEGLIGENCE.

*United States District Court, S. D. of New York.*

PROVIDENCE WASHINGTON INS. CO.

vs.

THE SIDNEY, AND HER CONSORT, THE WILLIAM WORDEN.\*

A cargo of wheat, from the West to New York, was laden at Buffalo, through M. & Co., forwarders, on the canal-boat W., and insured by them as part of the price of freight agreed upon. At the beginning of the season, M. & Co. had taken out an "open policy" with the libelants "for whom it may concern," which required that each transaction under it should be entered in an accompanying policy-book, or indorsed on the policy, stating the persons on whose account it was effected. A certificate payable to order was issued on this transaction to M. & Co., in their names, without the words "on account of whom it may concern," or equivalent words, and their names only were entered in the policy-book. M. & Co. delivered the certificate, indorsed by them, along with the bill of lading signed by the captain of the W., which they also signed, to the agents of the owners, paying some \$200 prior charges, and also making further advances to the captain for the trip. They took from the master a separate bill of lading, in which they were described as shippers, and in which the boat and cargo were consigned to their own New York agents, for their own protection. While the Worden was coming down the Hudson, in charge of the Sidney, both vessels belonging to the same owner, a steam-flue on the Sidney burst; the vessels drifted and stranded upon an island and the W.'s cargo was lost. The owners abandoned to the insurers, who paid them as for a total loss, and, claiming to be subrogated to the rights of the owners against the carriers, filed a libel against the S. and W., to recover for the loss. *Held*, That the consignees, the carrier, and M. & Co. had each an insurable interest in the cargo to its whole value; that a policy "for whom it may concern" assures all persons, having an insurable interest, that are intended to be covered by it, whether known to the insurers or not; that the conditions of the policy and the certificate in this case limited the general words of

\* Decision rendered, Jan. 30, 1885. From *Federal Reporter*.

the policy, and that only M. & Co., the persons named, were "the assured" under the policy; and that the persons and interests assured could not be enlarged by parol evidence, and that the libelants, on paying the owners, as indorsees of the certificate, were subrogated to the rights of M. & Co. only.

*I. & Co.*, in procuring freight and making advances on account of the carrier, acted as his agents. The insurance effected by M. & Co., was intended for the benefit of the shipper, the carrier, and for themselves, and was effected upon the request and authority of both, there being no express reference to subrogation in the policy. *Held*, that such subrogation is a mere equity, depending on the actual relation of the various parties to one another, and is therefore subordinate to the equitable rights existing between a principal and his agent, who effects the insurance for the benefit of both; that the payment by the insurers in this case to the owners, was, in effect, the same as a payment to M. & Co., and by the latter to the owners; that on payment of the insurance to M. & Co., the carrier, as principal, could have compelled a payment by M. & Co., as his agents, to the owners, in discharge of their joint liability under the bill of lading; and therefore that no equitable right of subrogation existed through M. & Co., against the carrier, in favor of the insurers.

The policy excepted loss through "want of ordinary care and skill in navigating said boats." *Held*, That if the case were one of doubt whether the loss happened by negligence or not, and if the carrier were not equitably entitled to the benefit of the policy, the insurers might have paid the owners of the goods with an assignment of all claims for damages to themselves, and then have prosecuted the carriers for indemnity, and recovered on proof that the loss was in fact due to negligence of the carrier; but that as the company has once paid the owner upon a voluntary settlement, as upon a loss under the policy, and the carrier being equitably entitled to the benefit of the policy, he is entitled to the benefit of the settlement made under it; and that such a settlement cannot be set aside except for duress, fraud, or mistake, and that the burden of proof, in an action to recover back the money from the carrier, was upon the libelants to show the fraud or mistake, and also that the loss was within the exception of the policy, and not a valid claim.

And as the libel charged negligence, and the answer denied it, and averred that the stranding of the boat occurred under such circumstances as negatived the charge of negligence, and no proof being offered by either party on this point, or that there was any fraud or mistake in the settlement, *held*, The libelant could not recover on the claim that the loss was not covered by the policy.

In Admiralty.

E. D. McCARTHY, for Libelants.

HYLAND & ZABRISKIE, for Respondents.

BROWN, J.

The libelants, at Buffalo, insured a cargo of wheat on board the canal-boat Worden, in tow of the Sidney, consigned to Armour, Plankinton & Co., of New York. One of the steam-floes of the Sidney having burst while she was coming down the Hudson River, she became unmanageable, and, as the answer states, drifted with the tide upon the rocks of Esopus Island, whereby the cargo on

board the Worden was lost. The cargo was abandoned to the libelants, who thereupon paid the consignees as for a total loss,—\$9,211.75,—and, claiming to be subrogated to the rights of the consignees against the carrying vessels for the loss of the wheat, filed this libel to recover the sum of \$6,175.89, the amount of the loss, after deducting the sum realized from the damaged cargo. The libel alleged that the stranding occurred through the negligence of the respondents, which the answer denies. On the question of negligence no evidence was given upon the trial. On that point both sides rested upon the pleadings, each claiming that the burden of proof was upon the other. Without reference to the question of negligence, however, inasmuch as the carrier had given a clean bill of lading binding himself to a delivery of the goods without exception or qualification, the libelants claimed that upon payment to the consignees they were subrogated to the benefit of the consignees' right of action for the loss of the goods against the carrier, as the principal debtor, for the non-delivery of the cargo; also that, upon the admissions of the answer, it was incumbent on the carrier to show that the stranding was without any fault on his part, if that is material. The general principles of law invoked by the libelants are not denied, either as regards an insurers' right to subrogation, upon payment of a total loss, to the rights of the assured against any other persons primarily liable for such loss, or as regards the presumptions of negligence. The only question is as to the applicability of these principles to the facts of the case.

The contract of insurance, in this case, contains no express provision for any subrogation of the insurers to the rights of the assured on payment of the loss. In such cases, the right of subrogation, if any exists, being no part of the contract, does not depend upon the contract, or on the form of it; it is a mere equity to be worked out through the rights of the assured only, in his relation to other parties. If the assured has a legal right to indemnity for the loss against a carrier that has no legal or equitable right to the benefit of the insurance, then the liability of the carrier to the assured is regarded as the primary liability for the loss, and the liability of the insurer as secondary, and similar to that of a surety only. The insurer, on payment, is therefore held, in such cases, to be equitably entitled to stand in the shoes of the insured, and to recover such indemnity as the insured was entitled to recover against other persons having no right to the benefit of the insurance: *Mobile & M. Ry. Co. vs. Jurey*, 111 U. S., 584; s. c., 4 Sup. Ct. Rep., 566; *Hall vs. Railroad*.

Cos., 13 Wall., 367 ; Garrison vs. Memphis Ins. Co., 19 How., 312. In the case of Hall vs. Railroad Cos., *supra*, the court say :—

“In respect to the ownership of the goods, and the risk incident thereto, the owner [the assured] and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract, or for non-performance of his legal duty. Standing thus as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner [the assured] for the loss, he is entitled to all the means of indemnity which the satisfied owner [the assured] held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner [the assured]. Hence it has often been ruled that an insurer who has paid a loss may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss.”

As the right of the libelants to subrogation can only be claimed through the rights of the assured, the questions chiefly litigated were—First, who were insured under the policy in this case? and, second, was the owner of these vessels equitably entitled to the benefit of the insurance, so as to cut off any right of subrogation that the insurers might otherwise have had against him?

The facts are as follows :—

The policy was issued in the name of Morse & Co., whose business is variously described as that of forwarders, carriers, transportation brokers, or, familiarly, scalpers. For convenience, I shall call them forwarders. They belong to a class of middlemen, long established in Buffalo, who handle all the freight business there, as intermediaries between the boatmen and the owners of grain and produce, or their agents, who desire to ship it eastward. The forwarders see the consignors ; agree upon the price of freight, which includes insurance ; procure boats to take the grain upon the terms fixed ; get a certificate of insurance and deliver it to the shipper along with the bill of lading, which they sign as well as the captain pay prior charges, if any ; make any advances necessary to the boatmen for the trip ; and receive, for their services, from the boatmen, a commission, usually 5 per cent upon the amount of stipulated freight. The insurance companies that engage in this kind of insurance have

provided a particular form of policy specially prepared for it. The shipper designates the company in which the insurance shall be effected. The forwarder, at the beginning of each season, procures from the various companies what is termed an "open policy," which is attached to a "policy-book," in which are entered the particulars of each insurance under it. To effect a particular insurance, the policy and the policy-book are taken to the office of the companies' agents, who enter in the policy-book the particulars of the insurance as applied for, and thereupon issue and deliver to the forwarder a certificate stating that insurance is effected, under the policy, upon cargo on board the vessel, of the value designated, and on account of the persons named; the loss, if any, payable to "the assured, or order, and return of this certificate." The certificate is therefore indorsed in blank by the forwarder and delivered the shipper, with the bill of lading, also signed by the forwarder, as above stated.

The transaction in this case was in accordance with the general custom above described. The grain in question was in charge of Mr. Meadows, as agent of the consignees in New York. Morse & Co. applied to him in negotiating for its transportation, and agreed upon the rate of five cents per bushel, including insurance, which the shipper directed to be taken in the libelants' company. Morse & Co. thereupon placed the transportation with Captain Wager, the owner of the Sidney and the Worden, and the grain was loaded upon the latter. When the cargo was loaded, Morse & Co. obtained the captain's bill of lading, and, having previously procured a certificate of insurance, delivered it, indorsed by them in blank, to Mr. Meadows, along with the bill of lading, which Morse & Co. also signed, paying him at the time \$200 for prior charges. The bill of lading recited Meadows as shipper on board the Worden, and provided for the delivery of the grain to the consignees in New York, without any exception or qualification, on payment of freight and prior charges, which were to be paid to Brooks & Co., the New York agents of Morse & Co.

The form of insurance was as follows: The "open policy" No. 772 states that the libelants, "by this policy, on account of Morse & Co., for whom it may concern, do insure the several persons whose names are hereinafter indorsed thereon as owner, advancer, or common carrier, on goods on his own boat, or boats belonging to others, from place to place, as indorsed hereon or in a book kept for that purpose, for the amounts, at the rate, and on the goods specified in said indorsement; no risk considered as insured until said indorse-

ment is approved and signed." There are various provisions in reference to the lading and unlading, and the time allowed therefor. The risks assumed by the company are those of the seas, canals, rivers, and fire, and all other perils, losses, or misfortunes to the goods during said trip, "excepting perils etc. from ice, jettison, theft, or from want of ordinary care and skill in lading or navigating said boats." There are numerous other provisions not material in this case. The certificate issued May 17th, on the application of Morse & Co., states that "Morse & Co. is insured under policy No. 772 in the sum of \$9,875, in board, cargo of boat Wm. Worden, on wheat \$9,875, at and from Buffalo to New York; loss, if any, payable to assured or order and return of this certificate."

The name of the consignees is not usually made known to the forwarder, and was not in this case known to him, until the grain was loaded. Upon the delivery of the bill of lading to the shipper, the name and direction of the consignee were written in the margin. When Morse & Co. obtained the certificate of insurance, they did not know who was to be the consignee. The agents of the insurers in Buffalo, who issued the certificate, and made the entry in the policy-book, were fully acquainted with the established customs and usages in this business. They knew that Morse & Co. were forwarders, doing business in the manner above stated; they understood that the certificate of insurance applied for, was designed to accompany a bill of lading of the goods in question; that Morse & Co. obtained the shipment of this cargo as agents of the captain; that they usually signed the bills of lading along with the captain; that they were accustomed to pay prior charges and to make advances to the captain; that the price of freight included insurance; and that Morse & Co. were paid for their services by the carrier by a commission on the amount of freight.

1. Upon the facts above stated, it is manifest that the consignees and the carrier, as well as Morse & Co., had each of them an insurable interest in the cargo to its whole value. Any person responsible for goods in his custody has an insurable interest in them to the extent of his liability: 3 Kent., 262; Hutch. Carr., § 429; 2 Duer., Ins., 49; Arn. Ins., § 107; Hooper vs. Robinson, 98 U. S., 528, 538; Savage vs. Corn Exchange etc., 36 N. Y., 655; Harvey vs. Cherry, 76 N. Y., 436; Waring vs. Insurance Co., 45 N. Y., 606; per GRAY, J., Eastern R. Co. vs. Relief etc., 98 Mass., 423; Com. vs. Hide & Leather Co., 112 Mass., 136, 141. The consignee had an insurable



interest, because he was owner ; the carrier, because as carrier he was answerable to the owner for the full value ; Morse & Co., because by signing the bill of lading they were equally responsible to the consignee for the safe delivery of cargo. As respects the consignee, indeed, both Morse & Co. and Captain Wager, by signing the bill of lading jointly, made themselves jointly liable as carriers ; although as between themselves, Morse & Co. were but agents in procuring freight and making advances on account of Captain Wager as principal. To secure themselves, Morse Co. took a separate bill of lading from the master, in which they were described as shippers ; and the boat and cargo were consigned to Brooks & Co., New York, as agents of Morse & Co. As each of these three parties had an insurable interest to the full amount, it was competent for Morse & Co., in taking out the insurance under an open policy "for whom it might concern," to insure for the direct benefit of all three ; and had the certificate of insurance, besides the words "Morse & Co.," contained the additional words "on account of whom it may concern," like the original policy, there can be no question that under the proofs in this case the policy would have inured directly to the benefit of all three, and all of them been "the assured ;" for the evidence leaves no question that Morse & Co. intended this insurance to operate in some form for the benefit of all. The agents of the insurance company so understood it ; Morse & Co., in effecting the insurance, did it by the direct request of the consignee's agent ; and they as clearly acted, and were understood to act, on account of the captain also. The insurance premium, though paid by Morse & Co., was charged as an advance against the captain and the freight, and was allowed as such by the captain before the loss ; and the evidence was that they acted for the captain's benefit as well as for their own. It is well settled that a policy "for whom it may concern" in such a case inures to the benefit of all persons having an insurable interest that are intended to be benefited by it, whether known to the insurers or not, and that such persons may sue upon the policy in their own names. A recovery by one against the insurers, in such cases, inures to the benefit of all, and bars any subsequent action by the others : Hooper vs. Robinson, 98 U. S., 528 ; Aldrich vs. Equitable Safety Ins. Co., 1 Woodb. & M., 272 ; Henshaw vs. Mutual etc., 2 Blatchf. 99 ; Fabbri vs. Phoenix Ins. Co., 55 N. Y., 129, 133 ; Walsh vs. Washington etc., 32 N. Y., 427, 439 ; 1 Am. Ins., 169, note ; Waters vs. Monarch Assur. Co., 5 E. & Bl., 870, 871.

The certificate of insurance issued in this case does not contain the words "on account of whom it may concern," or any equivalent words, but the names of Morse & Co. only. The necessary construction of the original policy with its conditions, is that, in order to make any particular transaction available under it, the names of the individuals on whose account any particular insurance under it is effected, must appear by indorsement on the policy, or by an entry made in the policy-book. This condition of the policy is a perfectly lawful one, and, being clearly expressed, is controlling. In this case the name of Morse & Co. alone is entered in the policy-book, without any additional words, as "for whom it may concern;" nor are they described as agents. The certificate is in accordance with this entry, and is made payable to Morse & Co., or their order. There is no language in it that can be so extended as to include other persons. Upon the written contract, therefore, "the assured," in the language of the policy, are Morse & Co. only. In such a case parol evidence is not receivable to vary the written contract, or to enlarge the interests of the persons directly assured: *Arn. Ins.* 169, note; *Mead vs. Mercantile etc.*, 67 Barb., 519. The indorsement of the certificate by Morse & Co. to the consignees, who were the owners of the cargo, effectually secured the latter. The consignees, in receiving payment of the loss from the insurers, received it, not as "the assured" under the policy, but as the indorseees of Morse & Co., pursuant to the terms of the contract, which provided for payment "to order." This was the mode agreed on and accepted for the security of all. It was a legal and effectual mode. In paying the consignees, the insurers paid them on account of Morse & Co., who were "the assured," pursuant to the indorsement; and hence the rights, if any, to which the insurers were subrogated upon this payment, were the rights of Morse & Co., and not the rights of the consignees, independently considered, against Captain Wager and his vessels. In legal effect, the transaction is the same as respects the insurers' rights of subrogation as if they had paid the whole loss to Morse & Co. as the "assured," and the latter had then paid the owners in discharge of their liability to them.

2. The relation of Morse & Co. and Captain Wager, as between themselves, was, as I have said, that of agent and principal. Morse & Co., by signing the bill of lading, had indeed made themselves liable as principals to the consignees; but, as between themselves, their liabilities were those of principal and surety. The insurance

effected by Morse & Co. was, as I have said, clearly shown by the evidence to have been intended as much for the benefit of Captain Wager as for themselves. It was effected upon his request and authority, and the premiums paid by Morse & Co. were charged against the captain and freight. Captain Wager was absolutely liable to Morse & Co. for this advance of premium, whether the freight or insurance money should ever be collected or not. The fact that these premiums, as part of the freight, were a lien upon the cargo and would be repaid to the captain or to Morse & Co., upon the delivery of the cargo to the owners, in case there were no loss of the cargo, is therefore immaterial as respects Captain Wager's interest in the policy. The insurance company sufficiently understood all this, since it was in the usual course of business as fully understood by them. But the insurance did not cover any negligence of the carrier, because such negligence was expressly excepted by the terms of the policy.

Under such circumstances, there can be no question that Morse & Co., on recovering from the insurance company the whole of the loss, would hold the money for the discharge of the joint obligation of themselves and Captain Wager to the consignee, and to that extent they would be regarded as trustees of Captain Wager, as the principal obligor; and Captain Wager, as principal, would have the right to compel that application of the insurance moneys. This would not in any way conflict with any of the terms of the policy, or of the certificate; and the relation of the parties, and the circumstances that gave Captain Wager this right, could, therefore, be legally established by parol. The situation is, in substance, analogous to the situation of mortgagor and mortgagee, where the latter, at the request of the mortgagor, insures the mortgaged premises in his own name, and at the expense of the mortgagee, and the insurance is intended for the benefit of both. In such cases, it has been repeatedly held that the mortgagor is entitled to the benefit of the insurance, and to have the amount paid to the mortgagee by the insurers applied in reduction of the mortgage debt; and that the insurers, consequently, have no right of subrogation thereto: *Story, J., in Carperter vs. Providence Ins. Co., 16 Pet., 502-507; Holbrook vs. American Ins. Co., 1 Curt., 193, 200; Kernochan vs. New York Bowery etc., 17 N. Y., 428; Waring vs. Loder, 53 N. Y., 581, 585; Cromwell vs. Brooklyn Fire Ins. Co., 44 N. Y., 42, 47.* But if the mortgagee insure his own interest, without any privity with the mortgagor, or if the insurance policy itself, in terms, provides for

subrogation to the mortgagee's rights upon payment of the loss, then the terms of the policy will prevail, and the mortgagor cannot have the benefit of the insurance, or compel the application of the payment to the reduction of his debt, and the insurers will be entitled to be subrogated to the mortgagee's rights against him: *Springfield etc. vs. Allen*, 43 N. Y., 389; *Excelsior etc. vs. Royal Ins. Co.*, 55 N. Y., 343, 359; *Foster vs. Van Reed*, 70 N. Y., 19; *Bank of S. C. vs. Bicknell*, 1 Clif., 85, 91-93.

In this case there is no provision for subrogation in the insurance contract; hence, any right of subrogation here, as previously stated, is a mere equitable right depending upon the actual relation of the other parties to each other. It is, therefore, subordinate to the equitable rights existing between a principal and his agent who effects the insurance for the benefit of both, and upon the account, and at the primary charge, of the principal.

It has been held that where the carrier expressly stipulates in the bill of lading that he shall have the benefit of any insurance effected upon the goods by the shipper, no subrogation against the carrier would arise in favor of the insurers upon their payment of a loss: *Carstairs vs. Mechanics & Traders' Ins. Co.*, 18 Fed. Rep., 473; *Rintoul vs. New York Cent. & H. R. R. Co.*, 21 Blatchf., 439; s. c., 17 Fed. Rep., 905. If such a stipulation is upheld when inserted in the bill of lading, it must be equally valid when clearly proved to exist by extrinsic evidence.

This insurance having been obtained, in fact, for the benefit of Captain Wager, as the principal carrier, and at his primary charge and request, as well as for the benefit of the agent, and also for the benefit of the consignees, through an indorsement of the certificate to them, and the insurers, in effect, knowing all the facts, Captain Wager, as principal, has a superior equity to the application of the insurance moneys in discharge of his liability as carrier; and as this equity is incompatible with any subrogation to the rights of Morse & Co., as "the assured," against Captain Wager or his vessel, no such subrogation can be allowed. The insurers' right being a mere equity to stand in place of Morse & Co., their right is subject to the same equities that affect Morse & Co. See *Kernochan vs. Bowery*, 17 N. Y., 428; *Benjamin vs. Saratoga Mut. etc.*, 17 N. Y., 415, 420; *Cromwell vs. Brooklyn Fire Ins. Co.*, 44 N. Y., 42, 47. As Captain Wager, moreover, had the right to have the moneys paid by the insurers, whether it was paid to Morse & Co. or to their indorsees, applied in discharge of his, Captain Wager's, obligation as

carrier, the payment by the insurers operated in law as an extinguishment of Captain Wager's liability ; and hence no obligation of Captain Wager to either Morse & Co. or to the owners, remained to which there could be any subrogation.

3. In what has been said above, reference has been had to a loss through causes covered by the policy. The policy, however, expressly excepts "want of ordinary care and skill in lading or navigating said boats." If the loss in this case happened through the negligence of Captain Wager or the carrying vessels, or from the want of ordinary care, then the loss was not covered by the policy, and no one was entitled to recover upon it against the insurers. For the loss by such negligence the consignees could have held both Morse & Co. and Captain Wager, under the bill of lading which both had signed ; and Morse & Co., on paying the consignees, could have resorted to Captain Wager and the carrying vessels for his indemnity, though he would have no valid claim upon the insurance company. If the case were one of doubt whether the loss happened by negligence or not, and the carrier were a stranger to the policy, having no equitable interest in the application of the insurance moneys, the insurers, instead of litigating their liability with the assured or their indorsees, might pay the owners of the cargo, as they did in this case, and take, as they did here, an abandonment of the goods, with an assignment of all claims for damages to themselves, and then prosecute the carriers for indemnity. *Excelsior etc. vs. Royal Ins. Co.*, 55 N. Y., 343, 352. It is not material to the carrier, according to the authorities, with whom he litigates the question of negligence ; and the insurers, in settling and paying such doubtful claims, are not mere volunteers : *The Monticello*, 17 How., 152, 155 ; *Insurance Co. vs. C. D., Jr.*, 1 Woods, 72 ; *Sun Mutual Ins. Co. vs. Mississippi Val. Trans. Co.*, 17 Fed. Rep., 919.

But here the carrier, as I find upon the facts, is not a mere stranger to the insurance. He is equitably entitled to the benefits of the policy ; and hence entitled by an equity paramount to that of the insurers, and as against Morse & Co., or their indorsees, to have any moneys paid on account of the loss to either of them applied in discharge of his own obligation. Any voluntary settlement made by the insurers with either, inures to his benefit as much as to theirs.

A voluntary settlement and payment are in general binding, and cannot be ripped up and set aside except upon some of the special and recognized legal grounds therefor ; such as duress, fraud, or mis-

take of fact : 2 Greenl., Ev., §§ 85, 120-123 ; Elliott vs. Swartwout, 10 Pet., 137, 154 ; Nichols vs. U. S., 7 Wall., 128. This rule applies not only to the immediate parties to the settlement, but in favor of others also that are in privity with them. The carrier here, being equitably entitled to the benefits of the policy, is clearly in privity with Morse & Co., the assured, and their indorsees. A settlement by the insurers with either inures directly to the benefit of all. It is as binding as respects all, as respects either ; and it cannot be set aside, as against either, except upon some of the special grounds above referred to. Upon either of these grounds it might be set aside, doubtless, in an action against the carrier ; but then only upon appropriate averments in the libel, and upon appropriate proof. And in such a case the whole burden of proof is upon the libelants. "It is incumbent upon them," says the court in the analogous case of Hooper vs. Robinson (98 U. S. 540), "to establish everything necessary to entitle them to recover, and they have no right to throw upon the defendant any part of the burden that belonged to themselves." See, also, Transportation Co. vs. Downer, 11 Wall., 129, 134.

If the proofs had shown, therefore, that this loss occurred by such negligence as rendered the insurers not liable upon their policy, and that the insurers had settled with and paid the owners upon a clear mistake of the facts in regard to their liability, I should hold that the libelants would be entitled to maintain an action against the carrier, under an appropriate libel for that purpose. But this is not a libel of that character. No mistake or misapprehension of any of the facts at the time of settlement and payment is alleged in the libel, or suggested in the proofs ; and as to the alleged negligence, no evidence has been given by either party. The libel charges negligence ; the answer denies it, and states that the stranding occurred under such circumstances as negative the charge. These averments of the answer must be taken as a whole. The libelants having once paid the loss, as a loss covered by the policy, if they sought to recover back the amount paid in an action against a carrier equitably entitled to the benefit of the policy, on the ground that the loss was within one of the exceptions of the policy, and was paid under a mistake of fact, must sustain the entire burden of proof, and affirmatively show both their ignorance and mistake as to the facts, and that the loss was actually within the exceptions of the policy.

The libelants are not in the situation of mere naked assignees of a cause of action for damages held by the consignees against the car-

rier ; nor do they sue in that character. It has been said that insurance companies have no power to purchase and sue on such claims independent of any question of their own liability. *Excelsior vs. Royal Ins. Co.*, 55 N. Y., 343, 357. Here they sue as insurers, who have paid the loss as covered by the policy ; and they now claim subrogation, in consequence of such payment, to a claim against the carrier. If, for the reasons above stated, they might be allowed to re-open the settlement made upon a mistake of fact, and prove that the loss was one not really obligatory on them to pay, because caused by negligence, the action must be one appropriate to that purpose, and the burden of proof in all respects be sustained by them. Neither the form of action nor the proofs meet these requirements ; and the libel must, in every point of view, therefore, be dismissed, with costs.

## GIFT INTER VIVOS.

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*Probate Court of Cook County, Illinois.*

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## IN RE ESTATE OF MARGARETHA H. SWAN, DECEASED.

That there is no legal objection to making a policy of insurance like the one in evidence, the subject of a gift inter vivos, and everything has been done to make the gift effectual as against the donors.

## BY THE COURT.

November 6, 1865, the Connecticut Mutual Life Insurance Company, of Hartford, Connecticut, issued its policy No. 49,988 of that date upon the life of William G. Swan, in consideration of the payment of \$97 (by Margaretha H. Swan, as stated in the policy), and other payments to be thereafter made, insuring the life of said William G. Swan in the sum of \$5,000 for its whole term, payable to said Margaretha H. Swan, her executors, administrators or assigns, ninety days after due notice and proof of death.

Margaretha H. Swan died intestate, September 7, 1880, leaving her surviving:—

1. Said William G. Swan, her son, who died January 17, 1884, leaving him surviving Jessie Lannon Swan, his widow, and Edmund S. Moss, William L. Moss, and Frances W. Moss, the three children and only heirs at law of Mary W. Moss, a sister of said William G. Swan, who died September 7, 1879, his only heirs at law.

2. Margaretha H. Swan also left said Edmund S. Moss, William L. Moss, and Frances W. Moss, the three children and only heirs at law of Mary W. Moss, a daughter of said Margaretha H. Swan, her only next of kin.

In June, July, and August, 1883, the said Edmund S. Moss, William L. Moss, Frances W. Moss, and William G. Swan, being all the



next of kin of said Margaretha H. Swan, executed and delivered to said Jessie Lannon Swan, then the wife and now the widow of said William G. Swan, instruments in writing, signed by all said next of kin, substantially as follows:—

“In consideration of one dollar, to me in hand paid by Jessie Lannon Swan, wife of William G. Swan, I do hereby sell, assign, transfer, and set over to said Jessie Lannon Swan all my interest in the policy of insurance No. 49,988 in the Connecticut Mutual Life Insurance Company, of Hartford, Conn., and all the money which may become due thereon.”

Said policy of insurance was delivered to said Jessie Lannon Swan, and it is conceded that no money consideration was paid as expressed in said writing or assignment.

The administrator of the estate of Margaretha H. Swan, deceased, has collected the amount of said policy and now has the proceeds in his hands.

Jessie Lannon Swan petitions this court for an order finding said assignments and their delivery, together with said policy, to be a gift inter vivos, and directing said administrator to deliver the proceeds of said policy now in his hands to her.

Edward S. Moss and William L. Moss defend against said petition, and claim that said writings or assignments are executory, and have been revoked by them and are now of no force; and they claim distribution as next of kin of said Margaretha H. Swan, deceased, the beneficiary named in said policy:

At the time of the death of said Margaretha H. Swan, said policy in its then immature state became an asset of her estate, and descended to her next of kin according to the statute of descent of Illinois, subject only to the payment of her debts; in brief, it was tangible personal property, and properly the subject of all laws governing, or applicable to, property of that class.

Gifts inter vivos and causa mortis were taken from the Roman law, and with their modifications have been the theme of much judicial discussion, and the decisions of the English and American courts are not entirely harmonious.

Chancellor Kent, in his Commentaries, lays down the rule, among others, that govern gifts; that the delivery in this, as in every other case, must be according to the nature of the thing. It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the

thing be not capable of actual delivery, there must be some act equivalent to it. \* \* \* If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed : 2 Kent's Com., 469.

In *Tillinghast, Admr., vs. Wheaton*, executor, after having announced some of the strict rules governing gifts, the court uses this language: " \* \* \* But in the more recent English decisions, the strictness of the ancient rule has been much relaxed; and it is stated by Mr. Redfield, who seems to have had access to all the later cases, that it is now fully settled in the English courts that not only are all securities which pass by delivery or by indorsement, when indorsed in blank, the subjects for a valid gift, *mortis causa*, but that even promissory notes and bills not negotiated so as to pass by delivery, and also promissory notes not negotiable, bonds, policies of insurance, and all other evidences of indebtedness which may be regarded as representing the debt, may, by a *parol* gift, and the delivery of the paper by which the debt is evidenced, either with or without written assignment or indorsement, constitute a good gift *causa mortis*, and this rule has been repeatedly recognized and applied by the American courts: *Brown vs. Brown*, 18 Conn., 410; *Waring vs. Edmunds*, 11 Md., 424; *Parish vs. Stone*, 14 Pickering, 198; *Turpin vs. Thompson*, 2 Met. (Ky.), 420. and other cases cited.

In *Penfield vs. Thayer*, Public Administrator, 2 E. D. Smith, N. Y., it was held that a valid gift *inter vivos* might be made of a bank pass-book without any writing or assignment, and if upon the donor's death the book falls into the hands of his representatives, who collect the money, the same may be recovered of them in an action by the donee; and that to constitute a valid gift a formal delivery is not essential if there be any act evidencing the intent.

In *Grover vs. Grover*, 24 Pickering, 261, it is held that a valid gift may be made *inter vivos* of a promissory note, payable to the order of the donor without indorsement by him or other writing, and in the event of the donor's death the donee may maintain an action against the maker of the note in the name of the donor's administrator against his consent.

In *Stewart vs. Hodden*, 13 Minnesota, the court says, "If the owner and holder of a promissory note made by a third person donates it either to the maker or another, the donation carries the debt secured by the note and is a symbolical delivery of it. If the maker of the note is the donee, the gift operates as a cancellation of

the note and debt. If a stranger is the donee, he may recover against the parties to the instrument.

It does not appear that there can be any legal objection to making a policy of insurance like the one in question the subject of a gift inter vivos, and everything seems to have been performed in this case which the law regards as necessary to make the gift effectual as against the donors.

The court is of the opinion that by making the instruments of transfer, and their delivery, together with the policy, to the donee, the title to all the money specified in the policy, whether due or thereafter to accrue, became vested in said petitioner, Jessie Lannon Swan, as effectually and fully as if she had obtained title thereto by purchase for a valuable consideration.

An order will therefore be entered directing the administrator to pay the proceeds of said policy to said petitioner, less the costs of administration, upon her giving a good refunding bond, conditioned that petitioner refund to said administrator so much of said sum as may be necessary to pay any debt that may hereafter be established • against the estate of said Margaretha H. Swan, deceased.

## WARRANTY AS TO AGE.—KNOWLEDGE OF AGENT.

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*Marion Co. (Ind.) Sup. Ct., Dec. 6, 1884.*

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BRIDGET GRAY

vs.

NATIONAL BENEFIT ASS'N.

This was an action brought by the plaintiff and mother of the insured to recover the proceeds of a policy or certificate of membership in the defendant association issued to her deceased son. The complaint alleges that the defendant is a corporation duly organized under the laws of the State of Indiana; that it covenanted and agreed to pay to the (plaintiff) beneficiary named in said certificate the sum of \$1,000, in case of the death of the insured while a member of the association in good standing etc.; that while her son was engaged as a locomotive fireman on the Kentucky Central Railway, and a member of said association entitled to benefits etc., he was by means of a collision of locomotives accidentally and instantly killed; that notice and proofs of death were duly and properly filed, and further, alleged due performance of all the requirements of a member under said certificate.

The defendants answered, denying any and all liability under the certificate, pleading a warranty of the conditions of membership. It alleged that a stipulation in said certificate stipulated that no applicant under the age of eighteen years of age should be received or insured in said association; that the said applicant was not eighteen years of age at the time of the issuing the certificate, nor at the time of the happening of his accidental death. It further alleged that said rule or condition was written in large, bold and red

letters in the body of the certificate ; that said applicant knew that he was not yet eighteen years of age and falsely and fraudulently misrepresented his age to the defendant in his application for insurance ; that according to the proofs of death he was not then eighteen years old, wherefore, it disclaims any liability as insurers on the ground of a breach of the warranty in his certificate of membership.

The issues were joined, trial had, whereupon the evidence tended to prove that the agent of the association as well as the applicant knew that he was not of sufficient age to meet the requirements of the rule, and he (the agent) testified that he acted under instructions from the president of the association ; that he (the president) had told him not to lose the opportunity of writing a policy where a few weeks only was the measure of time ; and referred to a case where an applicant desired to insure his life for the benefit of his affianced (wife), and was denied by the agent on account of a few weeks' time, but was subsequently by instruction of the president insured and the lady's name written (though not yet married) in the certificate in the name of her betrothed husband ; and believing the cases synonymous, he returned the application to the company representing that said applicant was eighteen years of age, when in fact, he lacked some eight weeks of having attained that age.

The court *Held*, That a warranty existed in the contract of insurance ; that the insured as well as the agent knew of the warranty ; that the insured under the plain provisions of the certificate had no right to rely upon the instruction of the agent, that the event of only a few weeks would make no difference, and that the plaintiff is not entitled to recover, and decree that she take nothing on account of this suit. Decree by Justice Walter.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

AGENT.

§ 92. FIRE.—*Responsibility of Foreign Corporation for Malicious Prosecution by.—Acts and Declarations of as Evidence.—Letter as Evidence.*—The general agent, or his assistant, of an authorized foreign corporation, acting under their general authority, may so far aid and abet a malicious prosecution in behalf of the company as to make the latter liable. The acts and declarations of a sub-agent are not admissible against his principal until his authority has been shown.

Campbell vs. Sherman, 49 Mich., 534; s. c., 14 N. W. Rep., 484.

Where witness had testified to receiving a letter from the agent to go to E. and look after a claim, which he regarded as instructions, it was not error to admit a question in relation to it which would rebut an inference from the original testimony.

*Turner vs. Phoenix Ins. Co.*

Rep'd Jour'l, p. 440

MICH. S. C.

#### ARBITRATION.

§ 93. FIRE.—*Agreement for will not Bar a Suit.—When no' a Condition Precedent—Prescribed Policy Form a Contract and not a Statute.*—An agreement to refer to arbitration will not be enforced in equity and will not be sustained as a bar to a suit at law or in equity. But an award can be made a condition precedent of a right of action by making a cause of action arise only upon a promise to pay an award. It is not unlawful for parties to impose a condition precedent with respect to the mode or time of paying damages or any matters of that kind which do not go to the root of the matter. The policy provided that the company should pay the amount for which it was liable within sixty days after statement furnished, or replace the property; also, in another place, that in case of dispute as to the amount "it is mutually agreed that the said loss shall be referred to arbitrators \* \* whose decision shall be final." *Held*, That the liability to pay arose upon the furnishing of the required statement, there was no agreement not to sue, and the submission to arbitration is not a condition precedent to the right of action. *Held*, That the fact that the form of policy was prescribed by legislative enactment did not conflict with its interpretation as a contract rather than as a statute.

Citing and discussing *Hood vs. Hartshorn*, 100 Mass., 117; *Avery vs. Scott*, 8 Exc., 500; *Scott vs. Avery*, 5 H. L. Cas., 811; *Eliot vs. Royal Exchange Assur. Co. L. R.*, 2 Exch., 237; *Braunstin vs. Accidental Death Ins. Co.*, 1 B. & S., 782; *Scott vs. Liverpool*, 3 DeG. and J., 334; *Tredman vs. Holman*, 1 H. & C., 72; *Horton vs. Sayer*, 4 H. & N., 613; *Roper vs. Lenden*, 1 El. & El., 825; *Dawson vs. Fitzgerald*, L. R., 1 Ex. D., 257; *Edwards vs. Aberagon Ins. Co.*, 1 Q. B. D., 563; *Nute vs. Hamilton Ins.*

Co., 6 Gray, 174 ; Hall vs. People's Ins. Co., 6 Gray, 184 ; Boynton vs. Middlesex Ins. Co., 4 Met., 212.

*Reed vs. Washington F. & M. Ins. Co.*

Rep'd Jour'l, p. 465.

MASS. S. J. C.

## BANKRUPTCY.

§ 94. FIRE.—*A Finding of Provable Claim in Decree of Adjudication not Conclusive.—Purchased Claims as a Set-off Against Reinsurance.*—The finding, in a decree of adjudication in involuntary bankruptcy, that the petitioning creditor has a valid, provable claim to the amount of \$250, is not conclusive upon the assignee and creditors, so as to dispense with proof of debt of the petitioning creditor, or to preclude questioning the right of such claim to participate in the distribution of the estate. Set-off arises only between independent debts, mutually due, between the same parties. The C. Co. reinsured certain risks with the G. Co. (both Ohio corporations), and losses occurred upon such risks. The former made an assignment under the State law, and, upon petition of the latter, was subsequently adjudicated a bankrupt. Between the date of the assignment and the filing of the petition in bankruptcy, the G. Co. purchased claims against the C. Co., for losses,—part being covered by the G. Co.'s reinsurance, and part being for other risks,—for the purpose of using such claims as offsets to its own liability. *Held*, That the claims so purchased for losses, which the G. Co. had reinsured, were a valid counter-claim against its indemnity of reinsurance upon such claims, and that this is not affected by the twentieth section of the bankrupt act, nor the amendment of 1874, nor by the principle of *Straus vs. Ins. Co.*, 5 Ohio St., 59. But, under the decisions of the Supreme Court of Ohio, claims for losses which the G. Co. had not reinsured, it could not set off against claims arising on other reinsurance ; it is a debtor to the bankrupt's estate to the amount of such latter claims. The former class of claims, though, is provable in its favor as a general creditor.

*Ins. Co. vs. Ins. Co.*, 38 Ohio St., 11 ; *Straus vs. Eagle Ins. Co.*, 5 Ohio



St., 53; *White's Bk. vs. Toledo F. & M. Ins. Co.*, 12 Ohio St., 601; *Ehrman vs. Ins. Co.*, 35 Ohio St., 324.

*Burke et al. vs. Cleveland Ins. Co.*

Rep'd Jour'l. p. 417.

OHIO U. S. C. C.

### BENEVOLENT ASSOCIATION.

§ 95. *LIFE.—Non-payment of Assessment not Excused by Sickness.*—The law regards mutual benevolent associations in the light of insurance companies, and where the articles of association declare that, where a member neglects to pay an assessment for more than thirty days after notice, he shall forfeit all his rights in the association, the fact that a member was sick and unable to attend to business for a part of the thirty days will not avoid the forfeiture.

*Yoe vs. Howard Masonic Mul. Ben. Ass'n.*

MD. C. A.

### BENEVOLENT SOCIETY.

§ 96. *LIFE.—Stranger or Creditor Cannot be a Beneficiary, when.*—A certificate of membership issued by an association organized under the provisions of the Revised Statutes, section 3,630, "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members," which by its terms is made payable to the assured member, "or any person designated by his will, or his heirs, if no person is designated herein, or by will," within ninety days after proof of death of the assured member, does not authorize such member, by testamentary appointment, to constitute a person a beneficiary of such insurance, who is not of the family of the assured, or may not, upon his death, become his heir. A bequest by an assured member of such a company, of the proceeds of his certificate of membership to a stranger or creditor, does not constitute such legatee an "heir" of the testator, in the statutory sense of that term.

State, ex rel. Attorney-General, vs. Central Ohio Mutual Relief Associa-

tion, 29 Ohio St., 399; *State vs. More*, 38 Ohio St., 7; *State vs. Standard Life Association*, 38 Ohio St., 381; *State vs. People's Mut. Ben. Association*, to appear in 42 Ohio St.; *State vs. Standard Life Association*, 38 Ohio St., 382.

*National Mut. Aid Association vs. Gonser.*

Rep'd Jour'l, p. 434.

O. S. C.

## GENERAL AVERAGE.

§ 97. MARINE.—*Foundation of.*—*When Contribution will be Enforced.*—*Relations of Parties.*—The principle of general average contribution rests upon the doctrine that, whatever is sacrificed for the common benefit of the associated interests, shall be made good by all the interests which were exposed to the common peril, and which were saved from the common danger by the sacrifice. It will be applied when (1) the ship and cargo are placed in a common, imminent peril; (2) there is a voluntary sacrifice of property to avert that peril; and (3) by that sacrifice the safety of the other property is presently and successfully attained. The fact that the property cast away would inevitably have perished even if it had not been selected to suffer in place of the whole, does not prevent the application of the doctrine of general average, unless such sacrifice did not contribute to the safety of the remainder. It is not necessary that there should have been any intention to destroy the property cast away, as no such intention is ever supposed to exist. The right of contribution depends upon an equity arising out of the relation of the parties, and is not based upon the contract of carriage. The principle is not applied between strangers, but only between those associated together in a common adventure and placed under the charge of a master with authority to act in emergencies as the agent of all concerned.

*Sonsmith et al. vs. J. P. Donaldson.*

Decision rendered, September, 1884.

MICH. U. S. C. C.

## INTEMPERANCE.

§ 98. LIFE.—*When Evidence will Sustain a Verdict.*—Although in the opinion of the court the evidence was in favor of

the alleged confirmed intemperate habits of the insured, a contrary finding will not be disturbed where there was enough evidence to induce an honest belief in accord with the finding.

*Muskegon National Bank vs. Northwestern Mut. Life Ins. Co.*

Rep'd Jour'l, p. 415.

N. Y. U. S. C. C.

## MORTGAGE.

§ 99. FIRE.—*Foreclosure not an Increase of Risk.*—The policy provided that in the event of the commencement of foreclosure proceedings, or if the risk be increased by any means within the control of the insured without the consent of the company, it should be void. The policy was issued in the name of the owner, payable to the plaintiff's mortgagee, with the usual mortgage clause. Shortly after, proceedings to foreclose were begun by plaintiff without the company's consent. *Held*, That the foreclosure proceedings were not as to the mortgagee an increase of risk which would defeat the policy unless disclosed.

*Phoenix Ins. Co. vs. Union Mut. Life Ins. Co.*

Rep'd Jour'l, p. 461.

IND. S. C.

## MORTGAGEE AND MORTGAGOR.

§ 100. FIRE.—*Insurance as General Owner.—Insurable Interest.—Change of Title.*—A mortgagee may insure as general owner without disclosing his particular interest unless inquired about.

*Norwich F. Ins. Co. vs. Boomer*, 52 Ill., 442.

A mortgagor who subsequently disposes of the premises has an insurable interest arising from his personal liability on the bond or note, and consequent interest in preserving the property.

*Lord vs. Crowell*, 75 Maine, 399; *Strong vs. Manf. Ins. Co.*, 10 Pick., 40, 44; *Curry vs. Com. Ins. Co.*, 10 Pick., 535, 542; *Richardson vs. Maine Ins. Co.*, 46 Maine, 394; *Campbell vs. N. E. Mut. L. Ins. Co.*, 98 Mass., 381, 403; *Williams vs. Rog. W. Ins. Co.*, 107 Mass., 379.

The insured had previously owned and mortgaged the premises, and then conveyed them to his son, taking back a mortgage. *Held*, That where the application was personal, it was no misrepresentation to describe them in a general way as his buildings. *Held*, That a release by the son of the equity of redemption of the first mortgages to his mother was not a change of title as to the mortgagee insured. *Held*, That the insurable interest of the insured was not limited to the equity of redemption of the mortgages, he was entitled to recover the whole amount of damages within the policy.

*Waring vs. Loden*, 53 N. Y., 581; *Strong vs. Manf. Ins. Co.*, 10 Pick., 44.

*Buck vs. Phoenix Ins. Co.*

Rep'd Jour'l, p. 412.

Ms. S. J. C.

#### ORAL CONTRACT.

§ 101. MARINE.—*By Secretary is Valid.—Evidence of Usage not Admissible to Invalidate.—Open Policy Clause requiring Indorsement does not Invalidate.—Evidence of Mode of doing Business Admissible*—An oral contract of insurance is valid, and a usage or custom that such a contract, if made, shall be considered invalid, would be plainly repugnant to law, and void. Evidence of such a usage would not be competent to destroy the force of an oral contract in fact made.

*Sanborn vs. Firemen's Ins. Co.*, 16 Gray, 448; *Relief Ins. Co. vs. Shaw*, 94 U. S., 574. *Runnell vs. Kimball*, 5 Allen, 356; *Porter vs. Hills*, 114 Mass., 106; *Scudder vs. Bradbury*, 106 Mass., 422; *Howard vs. Great Western Ins. Co.*, 109 Mass., 384.

A clause in an open policy of insurance to the effect that "no risk shall be considered binding unless indorsed therein," will not invalidate a risk orally accepted by the company under the policy and not indorsed therein.

*E. Carver Co. vs. Mfg. Ins. Co.*, 6 Gray, 214; *Kennebec Co. vs. Augusta Co.*, ib., 204; *Batchelder vs. Queen Ins. Co.*, 135 Mass., distinguished. *Goodrich vs. Lovely*, 4 Gray, 383; *Kennebec Co. vs. Augusta Co.*, 6 Gray, 204; *Commercial Ins. Co. vs. Union Ins. Co.*, 19 Howard, 318; *Rathbone*

vs. City Ins. Co., 31 Conn., 194; Ins. Co. vs. Norton, 96 U. S., 284; Eames vs. Home Ins. Co., 94 U. S., 627; Walker vs. Metropol., Ins. Co., 56 Maine, 371; Davenport vs. Peoria Ins. Co., 17 Iowa, 276.

Evidence as to the mode of doing business of an insurance company is admissible to show that the secretary of the company has authority to make a contract binding upon said company.

Smith vs. Hull Glass Co., 8 C. B., 668; 11 ib., 897, 927; Allard vs. Brown, 15 C. B. N. S., 468.

*Emery vs Boston Marine Ins. Co.*

Rep'd Jour'l, p. 427.

MASS S. J. C.

## RISK.

§ 102. FIRE.—*Increase of by Tenant.—Knowledge of Insured.—Burden of Proof.—Unintentional Omission from Proofs not a False Statement.*—The policy provided that any change increasing the hazard within the control of or known to the insured and not reported, would avoid the policy. The tenant made alterations increasing the risk. *Held*, That knowledge that the tenant was making general changes and repairs, did not imply that the insured consented to such as would increase the risk or that he knew that such were being made. It was for the company to show that the insured knew the character of the improvements, he was not liable for acts of the tenant done without his consent. The policy provided that an attempt to defraud the company in the matter of a claim, by false swearing or otherwise, should work a forfeiture. *Held*, That in the absence of evidence of knowledge on the part of the insured of alterations increasing the hazard, omission from the proofs of loss of any statement regarding such alterations was not a false statement which would defeat recovery.

*Merrill vs. Ins. Co. of North America.*

Rep'd Jour'l, p. 487.

MINN. U. S. C. C.

## RISK.

§ 103. FIRE.—*Self-evident Increase.—Rights of Mortgagee under Mortgage Clause.—Effect of Oral Renewal.—Knowledge of Broker.*—A wooden drying-house, one-story high, heated by steam from the boiler in the main building, was erected seven feet distant from a brick planing-mill insured. *Held*, That the drying-house was a self-evident increase of risk, and a contrary finding by a jury could not stand. *Held*, That the erection of the drying-house by the mortgagor insured, would not invalidate the original policy as to the mortgagee under a mortgage clause stipulating that his interest should not be invalidated by any act or neglect of the mortgagor.

Hastings vs. Westchester Fire Ins. Co., 73 N. Y., 141.

The fire occurred after the expiration of the policy, but it was claimed to have been renewed by oral agreement. The policy provided that it might be renewed by payment of premium, but any failure to notify the company of increase of hazard at the time of renewal, should render it void; also that the mortgagee shall notify of any increase of hazard within his knowledge, and if not permitted, shall pay the increased rates. The broker acting for the mortgagee knew of the increased hazard at the time of renewal. *Held*, That the knowledge of the broker is imputable to his principal, the mortgagee, and failure to make known the increase defeated the claims of the latter under the policy.

Dupee vs. Norwood, 10 Jur. U. S., 851; Graham vs. Firemen's Ins. Co., 87 N. Y., 69.

The evidence of the broker, purporting to give the whole conversation in which the alleged oral renewal was made, contained no reference to an increase of risk. The plaintiff in the trial below acquiesced in the assumption of the court that no disclosure had been made. *Held*, That the assumption cannot be disputed on review.

Cole vs. Germania Fire Ins. Co.

Rep'd Jour'l, p. 453.

N. Y. C. A.

## SUBROGATION.

§ 104. FIRE.—*Of Carrier under Contract in Bill of Lading.*—Cotton destroyed by fire while in course of shipment on a railway had been insured by the shipper. The bills of lading stipulated that, "in case of any loss by damage done to or sustained by any cotton herein receipted for during the transportation, the company alone shall be responsible therefor in whose custody the cotton was at the time of the loss, and the company incurring such liability shall have the benefit of any insurance which may be effected upon the said cotton." It was further claimed that the insurance company had waived to the shipper all conditions growing out of the clause in the bill of lading, and had agreed to pay them the insurance in case he did not recover from the railway company, thereby acknowledging the liability of the insurance company to the shipper, and the shipper is precluded from saying that there has been no insurance effected by him and that there is no insurance of which he will have the benefit. *Held*, That the bill or bills of lading under which the cotton of the plaintiffs in this case was transported by the defendant constitutes the contract of the parties, and the plaintiffs are bound by the stipulation of defendant company and shall have the benefit of any insurance that may have been effected upon or on account of said cotton. *Held*, That the plaintiffs, before they can recover against the defendant, must show that they have performed their part of this contract by proving that they have given the railway company the benefit of the insurance, or that they have been ready to perform their contract by tendering such benefit, and that the same has been refused. *Held*, That if an agreement was made between the plaintiffs and their insurers, by which their insurers waived the proofs of the loss and admitted the claim of the plaintiffs to be due by them, and on January 1, 1884, the plaintiffs agreed to give time upon the said claim to the insurers, and meantime to press the claim for the cotton against the railway company defendants, in consideration of payment to plaintiffs by their insurers of six per cent interest per annum on the said admitted claim from January 1, 1884, then the plaintiffs cannot recover.

*Immar. Swan & Co. vs. South Carolina Railway Co.*

Decision rendered, April, 1885.

S. C. U. S. C. C.

## TITLE.

§ 105. FIRE.—*Goods in Trust under Conflicting Policy Clauses.*  
—Plaintiff had an insurance in the defendants' company for \$2,500 "on petroleum, his own or held by him in trust for others, or sold but not delivered, while in custody of the Tidioute and Titusville Pipe Line, Limited." This was written in the policy. Among the numerous clauses of forfeiture in the printed portion of the policy was the following, "or if the assured is not the sole, absolute, and unconditional owner of the property insured," etc. There were other printed conditions which had no application to the insurance of oil in a pipe line. *Held*, That the plaintiff was entitled to recover from the company, not only for the loss of the oil which belonged exclusively to himself, but also for his oil which he owned in common with others.

Harper vs. Ins. Co., 22 N. Y., 443.

*Grandin vs. Rochester German Ins. Co.*

Rep'd Jour'l, p. 447.

PA. S. C.



## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME JUDICIAL COURT OF MAINE.

ABIJAH BUCK

vs.

PHENIX INS. CO.\*

A mortgagee may insure as general owner without disclosing his particular interest unless inquired about.

A mortgagor who subsequently disposes of the premises has an insurable interest arising from his personal liability on the bond or note, and consequent interest in preserving the property.

The insured had previously owned and mortgaged the premises, and then conveyed them to his son, taking back a mortgage.

*Held*, That where the application was personal, it was no misrepresentation to describe them in a general way as his buildings.

*Held*, That a release by the son of the equity of redemption of the first mortgages to his mother was not a change of title as to the mortgagee insured.

*Held*, That the insurable interest of the insured was not limited to the equity of redemption of the mortgages, he was entitled to recover the whole amount of damages within the policy.

VIRGIN, J.

Prior to the date of the policy sued on, the plaintiff gave two successive mortgages of his farm and also a deed of warranty

\* Decision rendered, Feb. 27, 1885.

thereof, subject to the mortgages, taking back at the same time a mortgage for the support of himself and wife during their respective lives. So that, when he effected the insurance, he was mortgagee of a third mortgage, or mortgagee of the equity of redeeming the first two mortgages. The plaintiff neither made nor attempted to make any written application, nor was he requested to make one by the defendant's agent, but simply said to him, "I have some buildings which I would like to have insured," naming them. He made no further mention of the nature of his interest and was not interrogated in relation thereto.

The first objection urged against the plaintiff's right of recovery, is an alleged misrepresentation of title; the defendant claiming that the above remark constitutes one, and that it was "material" within the intent of R. S. C., 49, § 20.

We do not understand that to be a misrepresentation. A mortgagee may insure as general owner without disclosing his particular interest, unless it is inquired about: 1 Jones, Mort., 397; Norwich F. Ins. Co. vs. Boomer, 52 Ill., 442. "Neither reason, authority, nor the contract of insurance," say the court in the case cited, "requires a mortgagee, unless interrogated, to state the nature of his interest in the property."

The plaintiff is not only mortgagee, and therefore holds the legal title of the equity of redeeming the two mortgages, but he is the mortgagor of them. They were given by him to secure notes signed by him. The holders of those mortgages and notes are not obliged to resort to the land mortgaged for the purpose of obtaining payment; they may bring a personal action on the notes and levy upon any other property of this plaintiff (*Lord vs. Crowell*, 75 Maine, 399); or they might enforce their statutory lien upon the insurance money due on this policy: R. S. C., 49, §§ 52, 53. And the mere speaking of the building as his, was not, in the absence of any inquiry into his particular interest, a misrepresentation of his title: *Strong vs. Manf. Ins. Co.*, 10 Pick., 40, 44; *Curry vs. Com. Ins. Co.* 10 Pick., 535, 542. If the defendant deemed incumbrances material, its agent should have made inquiries in relation thereto. Same cases. For when such inquiry is made, or when the applicant undertakes to disclose the particular nature of his interest, his representations must be substantially correct, or the policy will be void: *Richardson vs. Maine Ins. Co.*, 46 Maine, 394; *Campbell vs. N. E. Mut. L. Ins. Co.*, 98 Mass., 381, 403; *Williams vs. Rog. W. Ins. Co.*, 107 Mass., 379. Even after the plaintiff conveyed his equity of re-

demption, he retained an insurable interest, because of his liability on the mortgage notes, and his consequent interest in the preservation of the property charged with the payment of them : *Strong vs. Manf. Ins. Co.*, *supra* ; *Waring vs. Loden*, 53 N. Y., 581.

The next objection is that a change took place in the title, within the meaning of one of the conditions of the policy. The alleged change is the release by the son and mortgagor of the equity of redeeming the first two mortgages, to his mother, the plaintiff's wife. If such a change would operate as a breach of the conditions, then every mortgagor could render void his mortgagee's policy of insurance. The law is not open to such a reproach. We do not understand that that release operated at all upon the plaintiff's title ; and the authorities cited by the defendant have no applicability to this case.

These objections proving unavailable, the defendant claims that the insurable interest of the plaintiff cannot exceed the value of the equity of redemption of the mortgages. But this proposition is not tenable. In speaking of the interest of a mortgagor, *Wilde, J.*, said : "The value of his redeemable interest in the property is not material. If he had an insurable interest at the time the policy was effected, and also at the time of the loss, he is entitled to recover the whole amount of damage to the property, not exceeding the sum insured : " *Strong vs. Manf. Ins. Co.*, 10 Pick., 44. The sum insured on the property destroyed was six hundred dollars. As to the amount of damage to the property there is some difference among the witnesses. The plaintiff sold the farm after the fire for a little over seven hundred dollars ; and the witnesses estimate the value of the farm, including the buildings, before the fire, at from one thousand to one thousand two hundred, or one thousand three hundred dollars. We think, considering the age, condition, and size of the house, ell, and woodshed destroyed, that the entry must be,

Judgment for plaintiff for \$450 and interest from November 25, 1881.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

MUSKEGON NAT. BANK

vs.

NORTHWESTERN MUT. LIFE INS. CO.\*

A verdict will not be set aside merely because the court is of the opinion that a contrary verdict should have been rendered, unless it is clearly and palpably against evidence.

Motion for new trial.

JOHN E. PARSONS *for Plaintiff.*

EDWARD SALMON, *for Defendant.*

SHIPMAN, J.

This is a motion by the defendant for a new trial of an action upon a policy of life insurance, upon the ground that the verdict for the plaintiff was against the weight of the evidence. The defendant relied upon alleged false representations in the application in regard to the insured's habits of temperance and upon a breach of his promissory warranty against intemperance. I am not dissatisfied with the finding of the jury in regard to the alleged false representations in the application. When the application was made, the insured had been confessedly of temperate habits for over nine months, and had thus shown himself capable of self-control. I differ from the jury in regard to his habits after the policy was issued, because I am of opinion from the evidence that his habit of "spreeing," or indulging in occasional debauches, became more confirmed,

\* Decision rendered, February 9, 1884. *From Federal Reporter.*

frequent, and certain, until his bondage to intemperance was established ; and that the excessive use of liquor impaired his health and shortened his life. The uncontradicted facts that in April, 1881, while he was recovering from a spree, he employed a colored attendant for a fortnight to accompany him everywhere and guard him against the use of liquor, and that, notwithstanding, he occasionally became drunk, are strong proof to my mind that he had reached a point where he was conscious that he was powerless to withstand his periodical thirst for liquor. But, in the intervals between his sprees, it is plain that he was active, prompt, and energetic, and that he did not have the appearance of an intemperate man, and, from the fact that there was no indication of liquor about his person, I think that he did not drink during these intervals. The jury found that the insured was not "habitually intemperate, or so far intemperate as to impair health, apparently from the fact that his excessive use of liquor was occasional, and that he was abstinent during the periods which intervened between his attacks of intemperance. I can see that there was enough evidence in favor of the health and apparent temperance of Comstock, when he was engaged in business, to induce an honest belief that he had not yielded to intemperate habits, and that, therefore, the accounts which were given by persons who had seen him when he was intoxicated were exaggerated. The testimony of Messrs. Barrow, Parsons, Haines, and Goodsell shows that in their occasional or frequent interviews with Comstock in the business part of the city, and during business hours, they did not perceive that he ever drank liquor, and, I think, it is true that if he had drank without interruption his appearance and breath would have shown it. So that, while I think that the verdict should have been for the defendant, I cannot say that it was so much against the weight of evidence as to demand or justify the granting a new trial.

The jury gave more importance to the testimony for the plaintiff than I thought it deserved. While it was true, it did not seem to me to be convincing. It apparently seemed to the jury to be weighty, but new trials for verdicts against evidence should not be granted merely because the court thinks that a mistake was made. The mistake should be clear and palpable.

The motion is denied.

## UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT, OHIO.

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*Appeal in Bankruptcy from District Court.*

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IN RE CLEVELAND INS. CO., BANKRUPT.

BURKE AND ANOTHER

vs.

GLOBE INS. CO.\*

The finding, in a decree of adjudication in involuntary bankruptcy, that the petitioning creditor has a valid, provable claim to the amount of \$250, is not conclusive upon the assignee and creditors, so as to dispense with proof of debt of the petitioning creditor, or to preclude questioning the right of such claim to participate in the distribution of the estate.

Set-off arises only between independent debts, mutually due, between the same parties.

The C. Co. reinsured certain risks with the G. Co. (both Ohio corporations), and losses occurred upon such risks. The former made an assignment under the State law, and, upon petition of the latter, was subsequently adjudicated a bankrupt. Between the date of the assignment and the filing of the petition in bankruptcy, the G. Co. purchased claims against the C. Co., for losses,—part being covered by the G. Co.'s reinsurance, and part being for other risks,—for the purpose of using such claims as offsets to its own liability.

*Held*, That the claims so purchased for losses, which the G. Co. had reinsured, were a valid counter-claim against its indemnity of reinsurance upon such claims, and that this is not affected by the twentieth section of the bankrupt act, nor the amendment of 1874, nor by the principle of *Straus vs. Ins. Co.*, 5 Ohio St., 59. But, under the decisions of the Supreme Court of Ohio, claims for losses which the G. Co. had not reinsured, it could not set

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\* From Federal Reporter.

off against claims arising on other reinsurance ; it is a debtor to the bankrupt's estate to the amount of such latter claims. The former class of claims, though, is provable in its favor as a general creditor.

S. BURKE, for *Younglove*.

J. D. COX, for *Globe Ins. Co.*

MATTHEWS, J.

This a proceeding to review and reverse a decree of the district court, sitting in bankruptcy, sustaining the exceptions of the Globe Insurance Company to a report of the register in reference to its claim as a creditor. The claim, as stated and finally allowed by the decree, is as follows :—

Total claim.....	\$50,134 48
Credits admitted.....	47,353 77
Balance found.....	\$2,780 71

The nature of this claim, and the questions arising upon it, will appear from the following statement of facts, which are shown in the register's report and are not in dispute :—

The Cleveland Insurance Company, the bankrupt, and the Globe Insurance Company, which was the sole petitioning creditor, the proceedings being in involuntary bankruptcy, were both corporations under the laws of Ohio for the organization of fire insurance companies. In October, 1870, the Cleveland Company had outstanding fire risks in Chicago to a large amount, on which it procured from the Globe Insurance Company reinsurance amounting, upon adjustment of the losses reinsured, to \$47,353.77, being the credits given by the claimant to the bankrupt in the proof ; and this amount, it is admitted, is the adjusted loss for which the Globe Insurance Company would be liable upon the reinsurance. The policy of reinsurance stipulated "that all risks reinsured by this policy are subject to such conditions, privileges, alterations, and accommodations as may be given by the Cleveland Insurance Company, and all losses payable pro rata, and at same time with said Cleveland Insurance Company." The Chicago fire occurred in October, 1871, and on November 9, 1871, the Cleveland Insurance Company, having become insolvent by reason thereof, made a general assignment of all its property, under the law of the State of Ohio, to Moses C. Younglove for the equal benefit of all its creditors. The Globe Insurance Company sought to settle with the assignee for less than the full amount of its liability, but its offers of compromise were de-

clined. Thereupon it purchased claims against the Cleveland Insurance Company for the avowed purpose of using them as set-offs to the claim of the latter against itself. The claims thus purchased amount to \$50,134.48, and constitute the amount of debits in the proof of the claim filed. These claims were purchased prior to May 2, 1872, and consist of ten policies of insurance issued by the Cleveland Insurance Company, upon which the amount of the losses had been agreed on at the sum charged in the statement of account, and which have been assigned by the original owners to the Globe Insurance Company. Of these ten policies so assigned, four, in which the adjusted losses amount to \$14,482.50, were reinsured for the full amount by the Globe Insurance Company. The remaining six covered adjusted losses amounting to \$35,482.98, and on these policies there was a partial reinsurance on each, amounting in all to \$15,878.98, leaving \$19,773 not reinsured, and the whole amount reinsured, \$30,361.48. This amount, being the aggregate liability upon these ten policies of the Globe Insurance Company on its reinsurance, constitutes that amount of credits allowed in the account; the remainder of which, \$16,992.29, is made up of losses on five additional policies, which the Globe Insurance Company does not own. The other claims were assigned to it within 60 days prior to May 2, 1872, and after the assignment by the Cleveland Insurance Company to Younglove.

On that date, May 2, 1872, the Globe Insurance Company filed in the District Court for the Northern District of Ohio, at Cleveland, its petition, praying that the Cleveland Insurance Company might be adjudged a bankrupt, the act of bankruptcy charged being the assignment made by that company to Younglove. The petition alleged that the petitioner was a creditor to the amount exceeding \$250, provable in bankruptcy, and that its demand was as follows:—

“Among other indebtedness of said Cleveland Insurance Company to the petitioner, the sum of four thousand and ninety 90-100 dollars, being the one-half of an adjusted loss upon a policy of insurance issued by said Cleveland Insurance Company to Sweet, Dempster & Co., of Chicago, Illinois, of which the other half was reinsured to said Cleveland Insurance Company by your petitioner; and the whole of which said policy and the adjusted loss thereunder has been, since the occurrence of said loss, assigned by said Sweet, Dempster & Co., for a valuable consideration, to your petitioner; the whole of said loss, as adjusted and acknowledged by said Cleveland



Insurance Company, amounting to the sum of eight thousand one hundred and eighty-one 81-100 dollars."

An answer was filed denying the allegations of the petition, to which there was a reply; and, a jury being waived, the issues were submitted to the determination of the court. It was found by the court "that the respondent was indebted to the petitioner in the amount of more than \$250, as set forth in the said petition;" but the court also found that the assignment by the Cleveland Insurance Company to Younglove was not an act of bankruptcy, and accordingly, on October 16, 1874, dismissed the petition. This judgment was reversed by the circuit court, June 15, 1876, for error in not holding the assignment to be an act of bankruptcy. The Cleveland Insurance Company sought to reverse this judgment of reversal by suing out a writ of error from the supreme court, but this writ was dismissed for want of jurisdiction. *Cleveland Ins. Co. vs. Globe Ins. Co.*, 98 U. S., 366. Such proceedings were thereafter had therein, in the district court, that on October 9, 1879, the Cleveland Insurance Company was finally adjudged a bankrupt for the cause aforesaid, and by proper proceedings thereunder, M. C. Younglove, to whom the assignment had been made, was chosen and confirmed as assignee in bankruptcy, and accepted the trust. On January 19, 1880, the Globe Insurance Company filed with the register its claim as a creditor, with proof thereof, being for the balance of account, amounting to \$2,780.71, remaining after deducting from its claim of \$50,134.48 for policies of the Cleveland Company, and adjusted losses thereunder assigned to it, the amount of \$47,353.77, admitted by it to be due on account of reinsurance, the particulars of which have already been referred to. To the allowance of this claim, Burke, as a creditor, and Younglove, as assignee, filed exceptions. These exceptions were three in number, and as follows:—

1. It is first objected that the claim of the Globe Insurance Company to extinguish its liability on account of reinsurance, by means of claims for losses due from the Cleveland Company, is forbidden by section 20 of the bankrupt act of 1867, as amended by the act of June 22, 1874, which, it is contended, applies to this case.

Section 20 of the act of 1867 is as follows:—

"That in all cases of mutual debts or mutual credits between the parties the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid, but no set-off shall be allowed of a claim in its nature not provable against the estate; provided, that

no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition."

The amendment of June 22, 1874, added the following :—

"Or, in case of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off."

The amendment act also contains the following :—

"Sec. 21. That all acts or parts of acts inconsistent with the provisions of this act be, and the same are hereby, repealed."

It will be observed that in the present case the claims of the Globe Insurance Company were purchased before the filing of the petition in bankruptcy ; and that, although they were acquired after the act of bankruptcy upon which the adjudication was founded, and with a view of using them as set-offs, yet the amendment of June 22, 1874, did not take effect until after the petition was filed, though before the Cleveland Insurance Company was adjudged to be a bankrupt. It is accordingly contended by counsel for the petitioning creditor that this case must be governed by section 20 of the act of 1867, as it stood before the amendment.

2. It is objected to the allowance of these claims as set-offs, in the second place, that when they were acquired the title of the claim against the Globe Company, in favor of the Cleveland Company, had passed from the latter to Younglove, by virtue of its assignment to him ; and that, although that assignment was adjudged to be an act of bankruptcy, it was not void and without effect, but was voidable merely, and then only at the election and suit of the assignee, and not at the instance of an individual creditor ; and, if avoided, not so as to confer upon such creditors any preference to which they would not otherwise be entitled.

3. It is objected, in the third place, to the allowance of these claims, that the Globe Insurance Company was prohibited by the law of its creation from acquiring title to them for any purpose, or, at least, for the purpose of using them as set-offs to extinguish claims against itself.

On the other hand, it is contended that none of these objections to the claim of the petitioning creditor are now open, the matter of them all being *res adjudicata*, it having been necessarily determined by the judgment declaring the Cleveland Insurance Company a bankrupt.

But, for several reasons, it seems to me that this alleged estoppel does not arise. It cannot be admitted that the finding that the petitioning creditor has a valid, provable claim to the amount of \$250, which is all that is necessary as a predicate for the adjudication upon the alleged act of bankruptcy, is conclusive upon the assignee and creditors, so as to dispense with proof of the debt of the petitioning creditor upon the distribution of the estate. It is conclusive so far as necessary to uphold the adjudication of bankruptcy, but no further. It may still be questioned, in part or in whole, upon the proof subsequently required and taken, so that it might consistently happen that a claim which has been found to exist, for the purpose of adjudging bankruptcy against the defendant, might afterwards be held not to exist for the purpose of participating in the distribution of the estate. The assignee and creditors cannot be bound as to their own interests by the acts or default of the bankrupt, resulting in a judgment to which they were not and could not be parties, except so far as that judgment determines the status of the bankrupt. But, in the present case, the claim of the Globe Insurance Company, as presented to the register for allowance, was not set forth in the petition nor passed on by the court. The petition alleges that the petitioner is a creditor; that its demand exceeds \$250, "and is as follows, to wit: Among other indebtedness of said Cleveland Insurance Company to the petitioner, the sum of \$4,090.90, being the one-half of an adjusted loss upon a policy of insurance," etc., to Sweet, Dempster & Co.; but nothing whatever is said of its own indebtedness to the Cleveland Insurance Company, nor of its right to set off against that the several claims, including that mentioned in the petition, set out in its account, its claim being for the difference in its favor. So that the finding of the court, "that the respondent was indebted to the petitioners in the amount of more than \$250, as set forth in the petition," cannot be extended so as to cover the question now raised as to the right to use even the claim, specifically mentioned in the petition, as a set-off against its own admitted liability to the bankrupt's estate.

Nevertheless, in applying these objections to the claim of the Globe Insurance Company, they do not, any of them, touch so much of that claim as consists in compensating so much of the amount due on account of reinsurance, with an equal amount of the original claim of policy-holders, insured by the Cleveland Company, which were reinsured; that is, \$30,361.48. The claim to extinguish that amount of liability upon the reinsurance by producing, transferred and thus

canceled, the policies and losses on account and by means of which that liability has arisen, is not strictly nor properly a matter of set-off. That arises only between independent debts mutually due between the same parties. Here, it is a matter of counter-claim arising out of the same transaction, where the party sought to be charged as liable on the reinsurance meets that liability by proof of payment, discharge, and release of the very obligation for which the reinsurance was an indemnity. It is true that the original insurance and the reinsurance are independent and separate contracts; that there is no privity between the insured in the original policy and the reinsurer; and that a recovery can be had against the latter, at the suit of the reinsured company or its assignee, upon proof merely of the liability of the reinsured company upon the original policy, without actual payment. But it is equally indisputable that, to such an action, it would be a good bar, and complete defense, to show that the defendant had paid, and the original party insured had accepted, satisfaction of the loss insured and reinsured against, or to produce and prove a release from the original insured to the original insurer. This view is not inconsistent with the decision of the Supreme Court of Ohio in the case of *Ins. Co. vs. Ins. Co.* 38 Ohio St., 11.

The right to make such satisfaction, if the original party chooses to accept it as payment, is not a right to set off one debt against the other, but is the right merely of the party charged with a liability to show that he has discharged it; to prove that he has performed and not broken his obligation; to plead that the plaintiff has not suffered the damage against which the defendant had given an indemnity. This right, it is clear, is not affected by the twentieth section of the bankrupt act of 1867, nor by the amendment to it of 1874, nor by the voluntary assignment to Younglove, who would be as much bound by such a defense as his assignor, nor by the principle which denies to insurance companies of Ohio corporate power to purchase the assignment of claims against those to whom they are indebted for losses to be used as set-offs, in order to satisfy and pay them.

This principle is embodied in the third objection to the allowance of the claims in question. It rests for authority upon the decision of the Supreme Court of Ohio in the case of *Straus vs. Eagle Ins. Co.*, 5 Ohio St., 59. In that case it was decided that a fire insurance company, under the laws of Ohio, had no corporate power to acquire title to claims against the insured for the purpose of using them as set-offs against the claims for a loss. The language of Judge Ranney, in delivering the opinion of the court, was very strong and sweeping.

He declared as the company "could not, under the power of investment, employ its credit to purchase claims for such a purpose, that it had no power to become a party to the contract of indorsement by which it obtained the notes in question, and no capacity to take or hold the legal title." The principle of this case was re-affirmed and applied in the case of *White's Bank vs. Toledo F. & M. Ins. Co.*; 12 Ohio St., 601; but some of the language used in the case of *Straus vs. Eagle Ins. Co.*, supra, was limited and qualified as follows:—

"The court, indeed, say, in that case, that 'the contract' (i. e., the indorsement) 'is void and the instrument a nullity;' but while we concede that there was such an abuse of power as should prevent the relief asked, we are not prepared to hold, where the indorsement is one which, under certain circumstances, the company might lawfully accept,—in other words, where there was a mere abuse, and not a total want of power,—that such indorsement would be null and void for all purposes and as against all persons."

The doctrine, as thus qualified, was again affirmed in *Ehrman vs. Ins. Co.*, 35 Ohio St., 324. This must be regarded as the settled law of Ohio; and as, in the present case, both corporations are its creatures, that law furnishes the rule of decision. Its application is not prevented by the supremacy of the bankrupt act, for that does not assume to confer upon corporate bodies of the States any powers not given to them by their charters. It simply regulates, in the matter of set-off, such rights as parties may have lawfully acquired. What those rights are in each case must depend upon the general law of the land, and, when they rest upon corporate power, that law is the law of the locality which has created it. But the principle of the case of *Straus vs. Eagle Ins. Co.*, supra, as we have seen, does not apply here so as to forbid the *Globe Insurance Company* from purchasing the claims of original insured parties against the *Cleveland Insurance Company*, so far as necessary, and with a view to make good its obligation of indemnity, and to extinguish its liability upon the reinsurance. This is no abuse of its corporate power, and it is no injury to the company reinsured. It is a legitimate exercise of its corporate power in the proper performance of its contracts, and seeks its own protection only by removing the liability of the party it reinsured, which it undertook should not result in loss. And to that extent, therefore, the position of the *Globe Insurance Company* is justified against all objection. But that company went further than was merely necessary to extinguish the liability of the *Cleveland Company* for losses which the former had reinsured. It paid in

several cases where it had reinsured but one-half the risk, not merely the half it had reinsured, but purchased the entire claim for the whole loss, that it might use the half for which it was not a reinsurer as a set-off against claims arising on other reinsurances which it could not meet directly; for as to some of these, as has been stated, they did not become the owner of the claims for losses. There were five such claims, amounting to \$16,992.29. No part of any of these has been paid by the Globe Insurance Company to the original owners, and the Cleveland Insurance Company is liable to them respectively for the full amount. As against this liability the Globe Insurance Company is not at liberty to set off claims upon other losses for which it was not reinsurer; for, upon the principle decided by the Supreme Court of Ohio, to permit this would be an abuse of its corporate power.

It may be that it became necessary, in negotiating with the original claimants, to purchase an entire claim for the whole loss under a particular policy in order to become owner of the half covered by the reinsurance. But, if so, this does not appear from the record, and cannot be assumed as a fact. If it were, it does not seem to make any difference. If the Globe Insurance Company could not, as a matter of strict right, insist that the holder of an original policy should accept payment from it of one-half only of his loss, and he chose to make it a condition that to pay half the whole should be purchased, it is difficult to see how that could affect the rights of the Cleveland Insurance Company.

It is argued, indeed, on the part of the latter, that the Globe Insurance Company, by virtue of the decision of the Supreme Court of Ohio, already referred to, could not acquire the title to these claims for any purpose whatever, and cannot even prove as a creditor on their account. But, as already stated, the doctrine of that court, as finally qualified, does not go so far, but only prohibits the illegal use of such claims by way of set-off against claims for losses covered by other insurance. They remain in the hands of the Globe Insurance Company as claims provable in its favor, as a general creditor, entitled to dividends out of the bankrupt's estate pro rata with other unpreferred creditors. It is no objection to the view taken in this opinion of the relative rights of the parties that the Globe Insurance Company, by the form of its claim, has admitted itself to be debtor to the estate of the bankrupt to the full amount of the adjusted losses under the reinsurance, and seeks to cancel that indebtedness by a technical set-off, which is denied. This is

a mere matter of form, and will be disregarded. The substance of the transactions will alone be looked at, and the account recast into a different form, according to the legal rights of the parties, and so as to accomplish justice between them. This will be done by striking from the two sides of the account, as rendered, the quantities and values which the law regards as mutual compensations, leaving the Globe Insurance Company liable as debtor to pay in full all that remains due to the bankrupt's estate, and entitled as creditor to its dividends, on an equal footing with other general creditors. The conclusion of the register was that the Globe Insurance Company was not entitled to relieve itself from its liability as reinsurer to any extent by means of its claims against the bankrupt, and that, consequently, it was a debtor thereto for the full amount of \$47,353.77, but entitled to prove against the estate as a general creditor for the sum of \$50,134.48.

The district court, sustaining the exceptions to this report, decreed that the Globe Insurance Company was entitled to cancel its entire liability as reinsurer by crediting the amount thereof against the whole amount of its claims as holder of assigned policies and losses, and to participate in the distribution of the bankrupt's estate, as a creditor, for the balance, amounting to \$2,780.71. The conclusion now reached, as a result of the views expression in this opinion, differs from both. It is that the Globe Insurance Company is entitled to cancel \$30,361.48 of its liability as reinsurer, that amount being the whole amount of the assigned claims for losses reinsured by it, leaving it debtor on that account still in the sum of \$16,992.29, with interest, and entitled to rate as a creditor in the distribution of the bankrupt's estate for the sum of \$19,773. The decree of the district court is therefore reversed, and the cause remanded, with directions to enter a decree in accordance with this opinion.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

GEO. D. EMERY

vs.

BOSTON MARINE INS. CO.\*

An oral contract of insurance is valid, and a usage or custom that such a contract, if made, shall be considered invalid, would be plainly repugnant to law, and void. Evidence of such a usage would not be competent to destroy the force of an oral contract in fact made.

A clause in an open policy of insurance to the effect that "no risk shall be considered binding unless indorsed therein," will not invalidate a risk orally accepted by the company under the policy and not indorsed therein.

Evidence as to the mode of doing business of an insurance company is admissible to show that the secretary of the company has authority to make a contract binding upon said company.

This was an action of contract upon an alleged oral agreement by the defendant to insure the cargo of the barque *Bridgeport*, the property of the plaintiff. It appeared at the trial of the case in the supreme judicial court before Mr. Justice William Allen and a jury that the plaintiff took out an open or running policy upon the cargoes of the barque *Bridgeport*, which was intended to cover all goods of a certain kind shipped from certain ports, and contemplated an indorsement of such successive risks from time to time as should be within the terms of the policy. Said policy fixed the character of the property, the port of departure and of destination and the duration of the policy. It also contained a stipulation that no risk should be binding "until accepted by the company and indorsed in the policy." Under this policy, one cargo shipped at Santa Cruz was insured and indorsed in the policy. Subsequently,

\* Opinion filed, January, 1885.



the vessel was sent to New Orleans for another cargo, and while she was there loading, the plaintiff, as he alleged, made an oral agreement with the defendant that this cargo should be insured for \$10,000. This risk was never indorsed upon the open policy. The barque being lost on the voyage from New Orleans to Boston, plaintiff brought suit to recover the amount of the insurance. The defendant refused to pay, alleging that they never took the risk, and that no contract was ever made for the insurance of the cargo lost. The jury found for the plaintiff in the sum of \$9,062.37. The case was taken before the full bench upon exceptions to the rulings of the presiding justice, the nature of which appears in the opinion.

R. M. MORSE, Jr. and WM. B. DURANT, *for the Plaintiff.*

JOHN C. DODGE, and S. H. TYNG, *for the Defendants.*

ALLEN, J.

The plaintiff sought to escape from the effect of the provision in the policy, "no risk to be binding until accepted by the company and indorsed herein" by proof of an oral contract. And the defendant, while denying that such oral contract had been made, sought to confirm its view by calling a witness familiar with the customs and usages of the business of marine insurance in Boston, and asking him the question "whether there is any usage as to the matter of making written applications for marine insurance." The question was excluded; and the grounds upon which the defendant urges its competency are that the evidence of the usage would have tended to show an improbability of the truth of the plaintiff's testimony as to the making of oral applications for the insurance; and that the oral applications, if made, were merely preliminary negotiations, and not designed to override the usage. The bill of exceptions contains no statement of what the defendant offered or expected to show by this witness, or that it excepted to the exclusion of the testimony. But we do not dwell upon these considerations, because we are of opinion that evidence of a usage to require written applications would be incompetent for the purpose of meeting evidence on the part of the plaintiff tending to prove an oral contract of insurance. The fact that contracts of insurance are usually in writing and expressed in the form of policies is a matter of common knowledge and needs no witness to prove it; and it might have been, and doubtless was assumed at the trial of the present case; and indeed, this appears by implication from the

whole course of the bill of exceptions. But it is also well settled, and it is now too late to question, the doctrine that an oral contract of insurance may be valid: *Sanborn vs. Firemen's Ins. Co.*, 16 Gray, 448. As was said in that case, p. 443, "It is not easy to see the force of reasoning which would infer that, because parties usually make their contract in one way, it would be void when they choose to make it in another equally good at common law and not prohibited by any statute." See also *Relief Ins. Co. vs. Shaw*, 94 U. S., 574. A usage that an oral contract, if made, is considered invalid, would be plainly repugnant to law, and void. In the present case, the evidence of usage was offered, not in aid of the construction of a contract, but to support the position that no contract whatever had been made. If a contract had in point of fact been made as alleged, it was of no consequence whether it was according to general usage or not. The defendant's own usage sufficiently appeared from the provision in the policy already copied; and its by-laws were in evidence with a provision that "the president shall receive applications for insurance, fix the rates of premium and the sums to be taken, sign all policies," etc. The plaintiff's case proceeded with a full recognition of the fact that it was necessary for him to show a contract not according to the usual course of the defendant's dealing; and direct testimony was introduced on both sides, upon the precise point whether an oral contract of insurance had been made or not. There is nothing to show that any restriction was put upon any inquiry as to the defendant's own usage. It is no legitimate confirmation of the defendant's position, under such circumstances, to show that other insurance companies usually require applications for marine insurance to be in writing, as a condition of making the contract. This fact, if proved, would have no legal tendency to show that these parties did not make a contract orally. The plaintiff was not bound in law by such custom, if it existed. Whether other parties were, or were not, in the habit of making their contracts in a particular form was nothing to him. An oral contract was lawful; and the evidence was properly confined to the question whether this particular oral contract had been made as testified by the plaintiff, without going into the general inquiry whether other parties were accustomed to make such contracts.

The issue being whether a particular contract had, or had not been orally made, as it might lawfully be, evidence that contracts in that form were unusual was not admissible to meet and control

evidence that such a contract had in fact been made. To hold otherwise would be to extend the office of a usage beyond any known precedent. On the other hand, in *Sanborn vs. Firemen's Ins. Co.*, 16 Gray, which was an action upon an oral contract of insurance, the book of entries of the defendant's agent, in which the alleged contract was not entered, was offered in evidence to corroborate his testimony that no contract had been made, and was excluded. And a point settled in the case of *Rennell vs. Kimball*, 5 Allen, 356, is in principle precisely like the one before us. In that case, the plaintiff, a master mariner, purchased of the defendant by a written contract and a bill of sale, one-twelfth of a vessel, then undergoing repairs. It was in dispute, and there was a direct conflict in the evidence whether the parties agreed that the title should not vest in the plaintiff till the repairs were completed, and whether the defendant promised to pay for the repairs. A shipbroker of long experience was allowed to testify at the hearing before a master in chancery "that it was very unusual for a master to buy a master's interest in a vessel undergoing repairs; and that it would be an unheard-of case to sell such an interest to a master, and he to pay his contributory share of the expenses of the repairs." The court says in reference to this: "The admission of the testimony as to a usage or custom in the purchase of masters' interests in vessels was incorrect; and a finding based in any degree upon it would be erroneous. The evidence did not tend to prove any custom valid in law," p. 365. It may also be added as further reasons for holding the exclusion of the testimony in the present case correct, that there was no offer to show that the plaintiff was acquainted with the supposed usage, or that the usage related to the indorsement of particular risks upon open policies as well as to the original contract of insurance; nor can we know that the defendant expected to prove that the custom was not only general, but universal and uniform. *Porter vs. Hills*, 114 Mass., 106; *Scudder vs. Bradbury*, 106 Mass., 422; *Howard vs. Great Western Ins. Co.*, 109 Mass., 384.

The defendants asked the court at the close of the evidence to rule that, upon the evidence, the plaintiff could not maintain this action, which the court refused to do. In support of this request, the defendant has argued to us that, under the provision of the open policy already cited, an acceptance of the risk by the company, and an indorsement of it on the policy, are made conditions precedent to the commencement of the risk; and it is urged that the language

used is widely different from that used in *E. Carver Co. vs. Manfg. Ins. Co.*, 6 Gray, 214 ; and *Kennebec Co. vs. Augusta Co.*, ib., 204. But we think there can be no doubt that an oral agreement for a present insurance, according to the terms of a written and existing open policy, which insurance is to continue until it is superseded by the entry of the risk upon the policy, must mean, according to those terms, so far as they are applicable to such an oral agreement ; and if such policy contains a provision that no risk shall be binding until indorsed thereon, such provision is annulled by the latter contract, or is not included in it. The oral agreement necessarily implies that such condition is excepted out of it, and is not a part of it. The circumstance that the policy, as issued, contains such a condition precedent does not preclude the company from orally accepting a new risk, subject to all the other provisions of the policy, with an agreement to put it in writing thereafter by indorsing it upon the policy. There is no legal difficulty in such a construction. Parties to an existing written agreement may, by a new contract, not in writing, annul it, or add to or subtract from it, or vary or qualify its terms, and thus make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will then be left of the written agreement : 1 Chitty on Contracts (11th Amer. Ed.), 154, 155 ; 1 Greenl. on Evidence, §§ 302, 304. Illustrations of the application of this rule, pertinent to the present case, are numerous: *Goodrich vs. Loveley*, 4 Gray, 383 ; *Kennebec Co. vs. Augusta Co.*, 6 Gray, 204 ; *Commercial Ins. Co. vs. Union Ins. Co.*, 19 Howard, 318 ; *Rathbone vs. City Ins. Co.*, 31 Conn., 194 ; *Ins. Co. vs. Norton*, 96 U. S., 234. It is as if the insurance company, through its officers, should say : " We will take the risk now and put it upon the policy ;" and the case does not fall within the principle of *Batchelder vs. Queens Ins. Co.*, 135 Mass., 449, and other similar cases, where it was sought to prove an oral agreement contradicting the writing and contemporaneous with it.

The defendants also contend that there was no sufficient evidence of Lord's authority to make a contract of insurance in the absence of the president ; and on this ground except to the admission of the evidence of the alleged contract between the plaintiff and Lord. The provision of the by-laws that " in case of the absence, inability, or death of the president, policies and other papers shall be signed by two directors," relates only to the formal execution of papers which require signing, and does not exclude the making of oral contracts of insurance by any officer who may have authority or be

held out as having authority to make such contracts : Sanborn vs. Firemen's Ins. Co., 16 Gray, 454 ; Commercial Ins. Co. vs. Union Ins. Co., 19 How., 318, 321 ; Ins. Co. vs. Colt, 20 Wall, 566 ; Eames vs. Home Ins. Co., 94 U. S., 627 ; Walker vs. Metropol. Ins. Co., 56 Maine, 371 ; Davenport vs. Peoria Ins. Co., 17 Iowa, 276. In the present case, the plaintiff testified to certain conversations with Lord, the secretary, which included the contract relied on. He added that Mr. Fuller was not present at the time, and that his talk was with Lord alone ; that a few days before he had told Littlefield, the clerk, that he wanted him to enter up \$10,000 on this cargo, to which Littlefield answered, "all right." He also testified to an earlier conversation with Fuller, the president, in which the latter said that defendant would take the cargoes of the *Bridgeport*. Mr. Fuller himself testified that Lord was secretary and chief officer in charge after himself, the vice-president being in New York ; that he, Fuller, sometimes signed policies in blank and left them, in order that Lord might make the contract and deliver the policy ; that probably Lord had received applications and made indorsements upon policies of this description in his (Fuller's) absence, though he did not remember any particular case ; that it was his belief that it had been done ; that he presumed people had been in and had indorsements when he was away ; that he had never forbidden the secretary to make such indorsement, and, so far as he knew, nobody had ever forbidden it, though he had known of it all through the time the company had been in existence ; that he did not think the business of the company stopped when he was gone and did not intend that it should ; that all the directors were in the habit of dropping in at the office, but didn't pretend to have much to do about the business except we asked their advice sometimes. Mr. Lord also testified that while the office was open for business, they intended to have some one there to attend to business ; that for two or three years he had been in the habit of taking risks when Mr. Fuller was away, subject to his approval on his return ; that in such cases he completed the contract with the insured in the absence of Mr. Fuller, and could not name an instance in which Mr. Fuller had revoked or changed a policy issued or risk taken by him ; and that this practice had been known in the office to all the clerks. From this testimony the inference might properly be drawn by the jury that Lord had the requisite authority, express or implied, to enter an indorsement upon the open policy and to make a binding oral agreement to do so, and meanwhile to carry the risk. Relief Ins.

Co. vs. Shaw, 94 U. S., 574, 579 ; Smith vs. Hull Glass Co., 8 C. B., 668 ; 11 ib., 897, 927 ; Allard vs. Brown, 15 C. B. N. S., 468.

The defendant further contends that, even supposing Lord's authority sufficient, the words which the plaintiff puts into his mouth do not necessarily or naturally imply an intention on his part to waive or annul the condition precedent contained in the policy. But in the opinion of a majority of the court the jury might properly be left to say what the conversation meant, in view of all the circumstances. If the jury gave credit to the plaintiff's testimony we cannot say, as matter of law, that no contract was proved.

Finally, it is urged that, by the plaintiff's failure to bring in the invoices, or the information contained therein, to the defendants, within a reasonable time after their arrival, the contract was not completed and the defendants are not liable. But it was for the jury to determine whether September 12th was a reasonable time, and if they found that the defendants then disclaimed having any contract with the plaintiff in respect to this cargo there was no occasion for him to bring in the invoices afterwards.

Exceptions overruled.

## SUPREME COURT OF OHIO.

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*Error to the District Court of Holmes County.*

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## NATIONAL MUTUAL AID ASSOCIATION

v.

GONSER.\*

A certificate of membership issued by an association organized under the provisions of the Revised Statutes, section 3,630, "for the purpose of mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members," which by its terms is made payable to the assured member, "or any person designated by his will, or his heirs, if no person is designated herein, or by will," within ninety days after proof of death of the assured member, does not authorize such member, by testamentary appointment, to constitute a person a beneficiary of such insurance, who is not of the family of the assured, or may not, upon his death, become his heir.

A bequest by an assured member of such a company, of the proceeds of his certificate of membership to a stranger or creditor, does not constitute such legatee an "heir" of the testator, in the statutory sense of that term.

The action below was by the defendant in error, Absalom B. Gonser, against the plaintiff in error, an association formed for the "mutual protection and relief of its members, and for the payment of stipulated sums of money to the families and heirs of the deceased members," under the authority of the legislation embodied in the Revised Statutes, section 3,630, and having its principal office in the city of Columbus, Ohio.

On the 30th day of July, 1879, this association executed and delivered to one William Kebaugh, a resident of Holmes County, in

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\* Decision rendered, February 24, 1885.

this State, a certificate of membership, whereby it undertook, upon sufficient evidence and in the following terms, to "assure the life of William Kebaugh in the amount of such sum as will equal seventy-five per cent of the amount collected of the assessments made for the payment thereof, but not to exceed \$2,000. And the said association does hereby promise and agree to pay the amount of said claim at its office in Columbus, Ohio, in conformity with the rules and regulations of the association, to William Kebaugh, or any person designated by his will, or his heirs, if no person is designated herein, or by will, within ninety days after due notice and proof of said party, whose life is hereby assured."

This certificate was by its terms assignable by the consent of the association indorsed thereon.

Kebaugh accepted this certificate and remained a member of the association until his death.

On the 26th day of December, A. D. 1879, Kebaugh duly made and published his last will. On the 16th day of December, 1880, he died. On the 27th of December, 1880, his will was duly probated in and by the Probate Court of Holmes County. By the 3d day of January, 1881, full proofs of the death of the assured were duly made to the association.

The dispositive parts of the will are as follows :—

"Item I. I, Wilhelm Kebaugh, of Millersburg, Holmes County, Ohio, being of sound mind and memory, do make and publish this my last will and testament, hereby revoking all other wills or codicils made by me. And I further state that I have assigned to Abaalom B. Gonser, of said county, my certificate of life insurance No. 500, in the National Mutual Aid Association, of Columbus, Ohio, issued the 30th day of July, 1879, for two thousand dollars, upon the valuable consideration that the said Gonser has often befriended me with kindness and kindly offices, without which it would have often been difficult for me to have lived in comfort, and also for money received from him from time to time, during the last ten years, aggregating the sum of over eight hundred dollars, all of which was fully released and canceled by him at the time of the assignment of said certificate.

"And now, for the purpose of fully complying with the rules and regulations of said association with which I have been made acquainted by the agent thereof, and of the requirements of said certificate, and for the purpose of placing it beyond doubt that my said friend shall have the full benefit of said certificate and the proceeds



thereof, when payable, according to its terms, I make this my last will and testament in reference only thereto, not intending, however, to make a disposition of any other property or means belonging to me, and if I should at any time hereafter dispose of my other property and means by will, it is my intention the same shall not, by general, descriptive words or otherwise, have any effect upon the bequest herein made.

"Item II. I do hereby bequeath to Absalom B. Gonser, of Millersburg, Ohio, who has long been my friend, all my right, title, and interest in and to certificate "No. 500," in the National Mutual Aid Association of Columbus, Ohio, certificate on the life of Wilhelm Kebaugh, of Millersburg, Ohio, in favor of himself, issued the 30th day of July, 1879, and all proceeds which may hereafter become due by the terms of said certificate, the application on which it is based and by the rules and regulations of said association. Said certificate is issued for the sum not exceeding two thousand dollars, the said Absalom B. Gonser is to have the full benefit of said insurance, and I hereby designate him, to whom all the proceeds thereof are to be paid thereunder at my decease, and under the rules of said association, and said association relinquishing all and every claim thereto by the execution hereof and the assignment hereinbefore referred to."

Kebaugh died solvent, requiring no part of the proceeds of his certificate to pay his debts or costs of administering his estate. At the time of his death the association had outstanding and in force more than six thousand certificates of membership, liable to be assessed by it in the sum of \$6,000, for the payment of his certificate. No part of any claim under this certificate has been paid.

The petition of Gonser in the court below states the foregoing facts, has annexed thereto a copy of the will of Kebaugh as a part of it, and concludes with a prayer that the amount due him on the certificate may be found, the liability of the defendant determined, and that he may have judgment against the defendant for the sum of \$2,000, with interest, or for such sum as may be found due him on the certificate, with interest. The facts recited in the will are not substantially averred in the body of the petition.

The defendant below demurred to this petition for alleged insufficiency of the facts stated therein. This demurrer was overruled, and judgment rendered as prayed for in the petition. This judgment was affirmed by the district court on error, to reverse which judgments the present proceeding is prosecuted.

The overruling of this demurrer and rendering judgment upon the petition are assigned as ground of reversal.

M. A. DAUGHERTY, *for Plaintiff in Error.*

D. S. UHL and CRITCHFIELD HUSTON, *for Defendant in Error.*

OWEN, J.

Did the trial court err in overruling the demurrer to the petition and rendering judgment thereon against the defendant below?

That the plaintiff in error had no power to issue certificates of membership payable upon the death of an insured member to a person not an heir or of the family of a deceased member, and that such a certificate is void, is too well established to admit of controversy: *State, ex rel. Attorney-General, vs. Central Ohio Mutual Relief Association*, 29 Ohio St., 399; *State vs. More*, 38 Ohio St., 7; *State vs. Standard Life Association*, 38 Ohio St., 381; *State vs. People's Mut. Ben. Association*, to appear in 42 Ohio St.

By the terms of the certificate before us, the death-claim was made payable to the assured, Wilhelm Kebaugh, "or any person designated by his will, or his heirs, if no person is designated herein, or by will."

If the assured may designate the beneficiary of the insurance by testamentary appointment (a question whose determination is not necessary in the case before us), it is very clear that such beneficiary must be either a member of his family or one who upon his death may be his heir.

There is no averment in the petition that Gonser was a member of the family of the assured or that he is his heir. It is maintained by him, however, that the recitals of the will disclose such relations between him and the assured as entitle him to be regarded by the court as a member of the family of the assured.

This calls upon us to accept the mere recitals of the will as a substitute for substantive averments of fact in the petition, and would do violence to the rule of pleading which requires the facts relied upon by a party to be stated in his pleading, either by direct averment or by pertinent reference. Neither is done in the case before us.

It is further maintained that the assured constituted Gonser his heir by testamentary appointment.

If this view is tenable, it is in the power of each insured member

by will, to constitute him a beneficiary of the insurance who is not permitted by the company's charter to share in its benefits. The terms of the will indicate that its purpose was to give effect to a prior assignment of the policy to which the company had not given its assent. This court has already held, in *State vs. People's Mutual Benefit Association*, *supra*, that such an association has no power to issue certificates, payable to a named beneficiary, "or assigns," as this would authorize the creation of a class of beneficiaries neither contemplated nor authorized by the company's charter.

If an insured member may, by testamentary appointment, constitute one a beneficiary, who is neither a member of his family, nor may, upon his death, become his heir, he may thereby accomplish all the practical effects of an assignment of his policy, and thus defeat one of the declared objects of the statute.

But if we were at liberty to regard the recitals of this will as equivalent to substantive averments of fact in the petition, we could ascribe to Gonser no other relation than that of a creditor of the testator; and, as we have already seen, creditors are not of the class who may create beneficiaries of such insurance.

It is further maintained by Gonser, that as this company was organized, among other objects, for the "mutual protection and relief of its members," the assured member had the right, in his lifetime, and for his own "protection and relief," to make such use or disposition of the policy, either by hypothecation, by assignment, or by will, as would best yield such result. This argument involves the presupposition that Wilhelm Kebaugh, the assured member, is the party for whose benefit this policy was issued. It is in no sense an endowment policy. True, it is in terms made payable "to Wilhelm Kebaugh, or any person designated," etc., but it is expressly made payable "within ninety days after due notice and proof of death." It is clear that this policy contemplated that its benefits were destined to accrue to the person designated by the will of the assured, or to his heirs if no such designation were made. It follows, that to entitle himself to recover upon this policy, Gonser must bring himself within the operation of the second declared purpose of the statute, to wit: "for the payment of stipulated sums of money to the families or heirs of the deceased members of such company." Gonser's petition fails to bring him within either designation.

It is further maintained, in support of the petition, that the com-

pany, by the terms of its policy, authorized Kebaugh to make this will, and that it is thereby estopped to deny its liability.

Assuming that it was within the power of the company to issue a certificate in this form, and that the assured member was vested with the power, by testamentary appointment, to designate the beneficiary, this power ought, by every consideration of public policy and of sound construction, to have been so exercised as to effectuate and not defeat the object of the company's charter. If the language of the certificate be capable of two constructions, one of which is consistent with the statute and the other at war with it, it is our plain duty so to construe it as to give it effect according to the true intent and purpose of the law. If, then, Kebaugh was by the policy vested with power to appoint by will the beneficiary under it, the law plainly directed him to select such beneficiary from his family or heirs, and Gonser, being but a stranger, or at best a creditor, is in no position to profit by Kebaugh's perversion or abuse of the power of appointment with which the policy invested him.

This is no case for the application of the principle of estoppel. This court has held that a contract by such a company "to pay in case of a member's death, 'to himself or assigns,' 'to his estate,' 'to his executors or administrators,' or to any person, whether a relation or not, who is not of his family or heirs, is against public policy, and void." *State vs. Standard Life Association*, 38 Ohio St., 382.

The moment that the certificate before us is brought, by construction, within the view contended for by Gonser, that moment it falls as a vain and void thing, and considerations of graver moment than those of mere private right or contract call upon us to leave the parties to it where we find them.

We are not called upon, in the present case, to determine or discuss whether any or what claim the heirs of Kebaugh may have under this policy. It is sufficient for the disposition of the case that we find and declare that Gonser has failed, by the averments of his petition, to show himself entitled to recover upon it.

The court of common pleas erred in overruling the demurrer to the petition and entering judgment thereon, and the district court erred in affirming such judgment.

Judgment reversed.

## SUPREME COURT OF MICHIGAN.

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*Error to Saginaw.*

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TURNER

vs.

PHOENIX INS. CO.\* }

The general agent or his assistant of an authorized foreign corporation, acting under their general authority, may so far aid and abet a malicious prosecution in behalf of the company as to make the latter liable.

The acts and declarations of a sub-agent are not admissible against his principal until his authority has been shown.

Where witness had testified to receiving a letter from the agent to go to E. and look after a claim, which he regarded as instructions, it was not error to admit a question in relation to it, which would rebut an inference from the original testimony.

ALBERT TRASK, *for Plaintiff.*

WISNER & DRAPER, *for Defendant and Appellant.*

SHERWOOD, J.

This suit was brought to recover damages against the defendant for malicious prosecution. The plaintiff had been acting as agent of the defendant at East Saginaw, and in that capacity had collected some premiums which he refused to pay over when it was demanded by a special agent, the plaintiff claiming at the time the money was not due when demanded. Thereupon, the plaintiff was complained of by a local agent named McClintock, residing at East Saginaw, and

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\* Opinion filed, November 19, 1884. From *Northwestern Reporter*.

arrested for embezzlement. A hearing in the case was had before a magistrate, and the plaintiff was discharged. He now brings his suit, alleging that the arrest was authorized by defendant, and was unlawful, malicious, and without probable cause. The defendant's plea was the general issue. The plaintiff obtained a verdict at the circuit for \$3,070, and the defendant brings error. The record contains the substance of all the evidence given upon the trial. Fifteen exceptions were taken to the rulings of the court in receiving or rejecting the testimony offered, one to the refusal of the court to give instructions to the jury, and one to the charge as given.

The evidence disclosed that the defendant company was located at Hartford, Connecticut; that H. M. Magill was the general agent of the defendant in Michigan, and for the Western and Southern States, and had his office at Cincinnati; that he had the general charge of all the agencies and business of the company in Michigan in 1877 and 1878; that T. F. Spear was assistant general agent, and also resided at Cincinnati; that H. H. Heaford, whose residence was at Jackson, was a special agent for the State of Michigan; that all agents were authorized to make collections and remittances for the company, and any agent might employ an attorney when specially authorized so to do by the general agent or Mr. Spear.

It further appears by the record that the plaintiff Turner and said McClintock had been in business together at East Saginaw, and some time previous to the prosecution complained of their business relations had been dissolved, McClintock continuing to act as the local agent for the company at that city.

It further appears that there still remained due from the plaintiff to the company on the eleventh day of January, 1878, a balance of about \$50, and judgment was obtained a short time thereafter against the plaintiff and McClintock for such balance, and it was because of the non-payment of this balance when demanded that the criminal prosecution complained of was instituted. The local agent, McClintock, made the complaint upon which the warrant was issued, and the case was prosecuted at his request in behalf of the people by Michael Brennan, a lawyer, who had his office with Wisner & Draper, and who had formerly been their law student, and at that time occasionally received claims from their office to collect. The claim against the plaintiff had been sent to Wisner & Draper for collection by the company, and they had turned it over to Brennan for that purpose.

It further appears that Brennan, in his correspondence with the

plaintiff, in his efforts to collect, had signed the name of Wisner & Draper to his letters, in which a criminal prosecution is alluded to, if not threatened.

The plaintiff claims that the defendant authorized the criminal prosecution against him, and seeks to hold it responsible for the acts of its local agents and attorneys at Saginaw, who, he insists, advised and took part in the criminal prosecution; and further claims that if the defendant did not authorize commencement of the prosecution, it subsequently ratified what the local agents did, and the defendant is therefore liable for the alleged illegal act. It is not claimed by the plaintiff that the criminal prosecution was authorized, aided, or abetted, or even ratified, by the general office of the company, but by its general and special agents at Cincinnati, and by Heaford, its special agent in this State. Magill, Spear, and Heaford all testified in the case, and all testified the prosecution was never authorized by them, or either of them, but, on the contrary, they were all opposed to it, and that neither of them ever sanctioned, approved, or ratified any act of the local agents or attorney, if any had been done for that purpose, and that none of their local agents had any general or special authority given them for such purpose.

It is further claimed by defendant that not only was no such authority given to their attorneys, Messrs. Wisner & Draper, by the company, but that said attorneys never exercised such authority, and neither consented to nor approved of the prosecution complained of. After the testimony in the case was closed, the circuit judge, on request of defendant's counsel, submitted to the jury five requests for specific findings, which requests and findings appear in the record as follows: "(1) Was plaintiff prosecuted criminally by any agent of defendant? Answer. Yes. (2) If you say yes to above, name the agent. A. Wisner & Draper, Heaford, and Magill. (3) If you say yes to No. 1, state who, if any one, acting for defendant, authorized or directed the prosecution. A. Wisner & Draper, Heaford, and Magill. (4) Was the act of the person commencing the prosecution subsequently adopted or ratified by defendant's agents? A. Yes. (5) If you say yes to 4th, state what agent so ratified or adopted it. A. Heaford and Magill."

It will be noticed that the jury found by their verdict that both Heaford and Magill not only prosecuted the criminal suit, but that the acts of McClinton and Brennan, in commencing it, were subsequently adopted and ratified by them. These findings present three questions for our consideration, either of which, decided in fa-

vor of the defendant, will render a new trial necessary: First. Could Magill and Heaford, or either of them, bind the defendant so as to make it liable for the unlawful criminal prosecution of the plaintiff under the general authority of the one and the special authority of the other given by the company? Second. Was there any evidence in the case tending to show that Magill prosecuted, or authorized or approved of the prosecution, of the plaintiff criminally? Third. Was any part of the evidence tending to prove these facts improperly admitted by the circuit judge?

We think the first question must be answered in the affirmative. The company had a legal existence in this State and was authorized to do business therein. It could only act through officers or agents. It had no general office here, and was therefore obliged, in transacting its business, to act through agents. There is no question but that Magill was empowered to act as such in this State. He was its general agent, and, unless the contrary appears, must be held, within the territorial limits of his agency, invested with all the powers necessary or proper in conducting the business of a general officer of the company. Any other construction would be attended with great inconvenience, and many times work injustice to those with whom the defendant had dealings. It would be intolerable indeed to hold that the defendant, through its general agents, could do an extensive and lucrative business with the citizens of our State, within its borders, and still not be amenable to its laws for the wrongs and injuries it may have done to our people in prosecuting such business.

We have no doubt that Magill or his assistant, Spear, under their general authority, might so far aid and abet a malicious prosecution in behalf of the company as to make the defendant liable in an action by the injured party therefor. Did Magill do so in this case? The answer to this inquiry brings us to the consideration of the second question presented. We have examined carefully for the evidence that he or Spear knew of the commencement of this criminal suit, or of the intention to commence it, before it was instituted, or that Magill ever aided, abetted, or in any manner approved of its prosecution after it was commenced, and have been unable to find it. Neither do we find any tending to show such facts, but, on the contrary, his testimony is to the effect that the criminal proceedings were commenced without his privilege or consent, and the prosecution was never in any manner approved or countenanced by him. We think the finding of the jury upon this subject must be held er-



roneous, and that the record fails to furnish any evidence tending to support it.

Implied ratification is principally relied on in this case. Whether or not ratification can be implied by the acts of the agent when the act complained of could not have been lawfully done by the principal and the consequences of which were legally beyond the control of both, is a question which we do not feel called upon to consider. With propriety we might close our discussion of the case here; but, inasmuch as a new trial is to be had, we deem it our duty to consider a few exceptions under the third question stated.

The first, second, and third assignments of error relate to the rulings of the court upon admitting testimony of those acting as agents of defendant before establishing their authority so to do. This practice is frequently indulged in at the circuit; and, while it relates to the order rather than to the competency of the proofs, and is therefore discretionary with the trial court, the practice is not to be encouraged, and should not be allowed unless special reasons exist therefor. We are not, however, prepared to say the course pursued in this case upon the trial was improper. It was proposed by plaintiff's counsel to show the authority of the agent by circumstances, and as well by the actions as by the sayings of the principal, and in such cases the discretion of the circuit judge may be properly exercised when in good faith it shall be invoked: *Campbell vs. Sherman*, 49 Mich., 534; s. c., 14 N. W. Rep., 484.

It appears from the testimony that the criminal proceedings were commenced under the immediate advice of Brennan. It was not claimed that Brennan derived his authority from any officer or general agent of the company, but from Wisner & Draper, who were the company's attorneys in the civil suit. The plaintiff was permitted to show, against the objection of defendant's counsel, what Brennan said and did, and that he wrote the plaintiff letters in the name of Wisner & Draper before making any proof of authority from them. This, we think, was carrying the discretion too far. As we have said, under special circumstances the acts of the agent, and his sayings and doings, may be shown before the particular agency sought to be established is proved. But it is going beyond the reason for or necessity of the rule to extend it to sub-agents.

The testimony of Brennan and the letter marked 7, written by him, should not have been admitted until his authority had been shown. The objection of defendant's counsel was well taken. The court permitted two letters, written to Magill by Heaford, to be read

in evidence, against the objection of defendant's counsel,—to the first that it was irrelevant and immaterial ; to the second that it was written after the criminal prosecution had terminated,—and the court, in connection with its ruling upon the objection, stated: "I think it is competent. This man [meaning Heaford] is a part of the insurance company." This was clearly error. The court stated, as a fact, more, even, than the plaintiff asked the jury to find.

The plaintiff only asked the jury to find that Heaford was an agent, but the court relieved them entirely upon that point by saying he was a part of the company itself. This could not have failed to give the jury wrong impressions of what was necessary to be shown in order to make Heaford's statements competent evidence in the case. It was, substantially, saying to the jury, whatever Heaford said or did was authorized.

One of the letters above alluded to was put in evidence on the direct examination of a witness for the plaintiff as tending to show ratification by Magill of the act complained of, and upon the cross-examination the defendant sought to put before the jury a reply to the letter by Magill, in which he clearly states that the defendant disclaimed all connection whatever with the criminal proceedings, and further says the suit was without the defendant's instruction or consent. The letter put in evidence by the plaintiff was written the twelfth of March, and the reply thereto the 13th. The court refused to let the reply go to the jury. This was error. If the first was admissible, certainly common fairness required that the other should have been received. The latter rebutted the inferences sought to be drawn from the first.

No error was committed by the court in refusing to submit to the jury the special request to find, contained in the fifteenth assignment of error. The request does not call for a finding of any particular fact, but, presuming the jury will do so, asks them to make a report to the court of the testimony upon which they reached their conclusions. Such a request is improper under the statute.

On the direct examination of Mr. Heaford by plaintiff, the witness testified he received a letter and telegram from Magill to go to East Saginaw and look after defendant's claim, which he regarded as instructions. On cross-examination, counsel for defendant asked the following question: "Did that telegram direct you to come to East Saginaw and be a witness in the criminal case against Mr. Turner?" This was objected to as leading, and the objection sustained. This

was error. The question was within the rule of cross-examination, and the witness should have been allowed to answer.

It is unnecessary to consider the exceptions further. The charge having been based upon testimony improperly received, could hardly fail to be erroneous. The judgment must be reversed, and a new trial granted.

The other justices concurred.

## SUPREME COURT OF PENNSYLVANIA.

*Error to the Court of Common Pleas of Warren Co.*

GRANDIN

vs.

ROCHESTER GERMAN INS. CO.\*

Plaintiff had an insurance in the defendants' company for \$2,500 "on petroleum, his own or held by him in trust for others, or sold but not delivered, while in custody of the Tidioute and Titusville Pipe Line, Limited." This was written in the policy. Among the numerous clauses of forfeiture in the printed portion of the policy was the following, "or if the assured is not the sole, absolute, and unconditional owner of the property insured," etc. There were other printed conditions which had no application to the insurance of oil in a pipe line. *Held*, That the plaintiff was entitled to recover from the company, not only for the loss of the oil which belonged exclusively to himself, but also for his oil which he owned in common with others.

D. I. BALL and C. C. THOMPSON, Esq., for Plaintiff in error.

CHARLES H. NOYES, Esq., for Defendant in error.

PAXSON, J.

This case is not free from difficulty. The suit was brought in the court below upon a policy of insurance issued by the defendant company to the plaintiff to recover for a loss by fire upon petroleum burned in the Tidioute and Titusville Pipe Line, at the city of Titusville, in June, 1880. The insurance was for "\$2,500 on petroleum, his own or held by him in trust for others, or sold but not delivered, while in custody of the Tidioute and Titusville Pipe Line, Limited." And among the numerous clauses of forfeiture enumerated in the printed portion of the policy is the following : "Or

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\* Decision rendered, June 11, 1881. From *Legal Intelligencer*.

if the assured is not the sole, absolute and unconditional owner of the property insured," etc. The plaintiff sought to recover for : 1. Certain oil in which he had no interest, but which the owners had requested him in writing to insure ; 2. Oil of which he was the undisputed and sole owner ; and 3. A large amount of oil in which he had an undivided interest as tenant in common. Upon the case stated the court below entered a judgment for the plaintiff for only the oil secondly above mentioned.

That there could be no recovery for the first class of oil is clear. The plaintiff had no insurable interest ; he was not a consignor, and had no possession or control of the oil, and the policy was not on "account of whom it may concern ;" nor did it contain any clause or expression that would make the company liable without reference to the ownership. The difficulty in the case arises upon the third class, and is mainly owing to the fact that in making this insurance a form of policy has been used evidently intended for another and very different purpose. It contains conditions and stipulations which have no application to the insurance of oil in a pipe line. As an illustration, among the conditions which render the policy void are the following : "If the premises insured shall become vacant by the removal of the owner or occupant, and so remain for a period of more than thirty days without notice to the company and consignor indorsed hereon," or "if petroleum fluid or crude earth or coal oils \* \* \* are kept or used on the premises, except that kerosene oil may be used for lights in dwellings," or "if burning-fluid or refined earth or coal oils are kept for sale, stored, or used on the premises, in quantities exceeding one barrel at any time, without written consent, \* \* this policy shall be void."

We have here a number of conditions which as applied to this particular contract of insurance, are meaningless. It would be absurd to attempt to give them any force or effect. The insurance itself is of a peculiar character ; the form of policy is one in general use in ordinary contracts of insurance upon ordinary property ; many of its conditions are admittedly inapplicable to this kind of insurance. Under such circumstances, when it is attempted to defeat a recovery upon the ground that, under one of its conditions, the policy is void, we are driven to an examination of the character of the condition, and the reason upon which it is founded, in order to ascertain whether it could have been in the contemplation of the parties when the contract of insurance was made. The necessity for this arises from the act of the defendant company in issuing a policy

not adapted to the subject-matter of insurance, and containing so many incongruous conditions.

The defendant company alleges that the plaintiff was not "the sole, absolute, and unconditional owner" of the third class of oils, and, as a legal deduction from this fact, claims that the plaintiff is not entitled to recover to the extent of his interest.

If the insurance were upon a horse, a house, or a stock of merchandise, there would be great force in this position. But does the condition apply to the insurance of oil in a pipe line?

In considering this question, we must take a reasonable view of the contract. It was evidently one of indemnity. It was for this the plaintiff contracts, and we would not do the company the injustice even to suggest that it had not the same end in view. The plaintiff paid \$250 for his indemnity; under the ruling of the court, only 297 barrels of his oil was covered by his policy, worth but little more than the premium which he paid, and the amount for which judgment was entered was \$25.53. This is not indemnity; yet if it was what the parties contracted for no one has any cause of complaint, even if the condition in question applies to this policy; if it was in the contemplation of the parties when the contract of insurance was made, and was intended to apply thereto, the judgment must stand. Assuming then, that this was a contract indemnity, and was so intended by the parties, we find that the plaintiff is insured on petroleum, "his own, or held by him in trust for others, or sold, but not delivered." This clause of the policy is in writing, and must be taken to be what the parties intended; the condition is in the printed portion. The settled rule is that when the written and printed portion are repugnant to each other, the printed form must yield to the deliberate written expression: *Harper vs. Insurance Co.*, 22 N. Y., 443. So far, therefore, as this printed condition is applicable at all, and conflicts with the written portion of the contract, it must give way to the latter.

But is the condition applicable to this insurance?

There are a number of cases in which the courts have refused to enforce a condition of forfeiture because the case did not come within the reason of the condition. A familiar instance may be given in the condition to be found in most insurance policies that the policy should cease at and from the time the property insured shall be levied on or taken into possession or custody under any proceeding at law or in equity. It has been repeatedly held that this condition was not broken by a levy upon the property insured,

unless the same was taken into the actual possession of the sheriff or other officer : *Insurance Co. vs. Berger*, 6 Wright, 285 ; nor where the property insured was levied upon under an execution against a stranger : *Insurance Co. vs. Mills*, 8 Wright, 241. It was held by this court, in *Insurance Co. vs. Berger*, *supra*, that a mere levy without actual seizure, while good as a levy, was not within the meaning and reason of the condition. It was said by Mr. Justice Strong : "The eleventh condition (execution clause) must have been attached to the policy for at least some supposed substantial reason. Its purpose, doubtless, was to secure the company against any other hazard than that which they first assumed. To them it was important that while the risk continued the goods should not be taken out of the possession of the assured."

It will thus be seen that where the reason of a condition does not apply this court has refused to apply it. Other instances of the same kind might be cited were it necessary. We are not to suppose that conditions involving forfeitures are introduced into policies by insurance companies which are purely arbitrary and without reason, merely as a trap to the assured, or as a means of escape for the company in case of loss. When, therefore, a general condition has no application to a particular policy, when the reason which alone gives it force is out of the case, the condition itself drops out with it.

The condition in question refers to the title or ownership ; indirectly, it bears upon the custody. Where a house or a stock of goods is insured, it may be very important to the risk for the company to know whether the insured is sole or only part owner, because the ownership of personal property at least draws to it the custody and possession thereof as an incident. The possession is usually an actual possession ; an insurance company might be very well satisfied to insure a stock of merchandise owned by A, and in his actual possession, while they might object to insure a stock in which B was jointly interested with A, for the reason that while they knew A to be an honest man, they might know equally well that B was a rogue ; no such reason applies in this case. The subject-matter of this insurance was petroleum ; it was not in the possession of plaintiff nor of his other tenants in common ; on the contrary, it was in the tanks and pipes of the Tidioute and Titusville Pipe Line Company. Here comes in one of the peculiarities of the insurance. It could not be said to be upon any particular oil. The plaintiff's oil was mixed with the oil of other persons. His certificates entitled him to draw out so many barrels of oil ; not the specific oil he put

in, but an equal quantity of other oil of like value. As was said in *Hutchinson vs. Commonwealth*, 1 Norris, 472 : "Each barrel of oil in the pipes is the precise counterpart of every other barrel oil contained therein." It is true this is not set out in the case stated, but it does show that the oil was in the pipe line ; and the manner of conducting business by the pipe lines in this respect is too public and notorious for us to shut out our eyes and pretend not to see it. The whole matter has been before us judicially again and again, and we know that individual oil is mixed with other oil in the pipe lines as well as we know that water will run down hill.

While the plaintiff was not the owner of any particular barrels of oil, yet he had the right to draw out of the pipe lines a certain number of barrels of oil. He had such an ownership as was decided in *Hutchinson vs. Commonwealth*, *supra*, to be the subject of embezzlement. It was certainly the subject of insurance, yet here again the insurance was peculiar. For losses of oil in the pipe lines there appears to have been a liability of assessment upon the remaining oil in the pipes, and it was to protect against this liability that this policy was taken out. To the extent that the plaintiff held oil in the pipe lines in common with others, he was the owner of such oil to the amount of his interest. Thus, if he owned 15,000 barrels in common with B and C, he would be owner of 5,000 barrels, and, as such, entitled to draw it out. I do not speak of the form by which this would be accomplished. I refer to the right to the oil, to the fact of ownership, and the right to appropriate it to his own use. To this extent he would be sole owner of his share of the oil ; the fact that it is undivided makes no difference ; all the oil in the pipe lines was undivided ; it was mixed with the oil of others, just as his share was mixed with that of his co-tenants. He was therefore the sole owner of certain undivided oil, and the condition of the policy, even if applicable, cannot fairly be held to bar his recovery. There is nothing in the policy which avoids it, because the property insured consists of undivided interests, which means merely undivided oil.

We have a right to assume that the parties contracted with reference to the peculiar nature and situation of the subject-matter insured. It is not reasonable to suppose the plaintiff was contracting for the insurance of only a few hundred barrels of oil when he had many thousands of barrels in the pipe lines of which he was undoubted owner. He contracted for indemnity, and when the defendant company received his money it is only a fair construction



of the contract to hold that the company intended and agreed to indemnify him to the extent of his oil in the pipe lines. This reasonable view is not to be defeated by setting up one of many conditions in the policy, which was probably inserted as applying to other subjects of insurance, and the reason and object of which do not appear to apply to this particular contract. Whatever doubt there may be in regard to this condition must be resolved in favor of the assured. If there is any obscurity in the meaning of the policy it is the fault of the company in not giving it clearer expression ; and, as between the parties, it must be construed most strongly against the insurer.

Assuming that the condition referred to was at least intended for a reasonable purpose, of what possible importance was it to the defendant company that other parties were interested with the plaintiff in certain of the oil ? He was not in actual possession ; his co-tenants were not in possession ; by no act of his or theirs could the risk be increased, whether such act was the result of fraud or mere negligence. The oil was in the pipe lines ; it was in the custody of other parties, whose care of it would not be affected by anything the owners might do or leave undone. The case differs essentially from the ordinary one of insurance upon property which is the name and possession of the insured, and the risk of which may be increased or diminished because of such possession.

We are of opinion that the plaintiff is entitled to recover for the oil which he owned as tenant in common with others.

The judgment is reversed, and judgement is now entered here for the plaintiff, upon the case stated, for \$2,500, with interest from October 17th, 1880, and costs.

COURT OF APPEALS OF NEW YORK.

ISAAC I. COLE, ASSIGNEE ETC.,  
 vs.  
 GERMANIA FIRE INS. CO.\*

A wooden drying-house, one-story high, heated by steam from the boiler in the main building, was erected seven feet distant from a brick planing-mill insured.

*Held*, That the drying-house was a self-evident increase of risk, and a contrary finding by a jury could not stand.

*Held*, That the erection of the drying-house by the mortgagor insured, would not invalidate the original policy as to the mortgagee under a mortgage clause stipulating that his interest should not be invalidated by any act or neglect of the mortgagor.

The fire occurred after the expiration of the policy, but it was claimed to have been renewed by oral agreement. The policy provided that it might be renewed by payment of premium, but any failure to notify the company of increase of hazard at the time of renewal, should render it void; also that the mortgagee shall notify of any increase of hazard within his knowledge, and if not permitted, shall pay the increased rates. The broker acting for the mortgagee knew of the increased hazard at the time of renewal.

*Held*, That the knowledge of the broker is imputable to his principal, the mortgagee, and failure to make known the increase defeated the claims of the latter under the policy.

The evidence of the broker, purporting to give the whole conversation in which the alleged oral renewal was made, contained no reference to an increase of risk. The plaintiff in the trial below acquiesced in the assumption of the court that no disclosure had been made.

*Held*, That the assumption cannot be disputed on review.

ANDREWS, J.

The original policy, dated January 14, 1881, insured the firm of C. F. Dielmann & Co. against loss or damage by fire "on their brick building occupied for planing and wood-working purposes,

\* Decision rendered, April 14, 1885

situated Nos. 547 to 555 West Twenty-first Street," in the city of New York, for one year from January 19, 1881, in the sum of \$1,000, "loss, if any, payable to W. C. Herrick, mortgagee," and contained a special clause known as the "mortgage clause." Among the conditions in the policy was one making it void in case of "increase of hazard" by the erection of neighboring buildings. During the life of the original policy, as was assumed on the trial, and (as the evidence we think clearly established), Dielmann & Co. erected on the premises, at a distance of six or seven feet from the main building, a drying-house constructed of wood, one-story high, intended for the drying of lumber, and in which they placed a large amount of lumber, using therein steam introduced by pipes connecting with a boiler in the main building.

Mr. Hamlin, an insurance broker, who acted as agent for Dielmann & Co., and also for Herrick, the mortgagee, in procuring the original policy and in making the alleged renewal agreement, testified that "a frame building is more hazardous than a brick building; the close proximity of a frame building to a brick building, ordinarily increase the hazard of a brick building." Upon this testimony, which was undisputed, and the uncontroverted facts as to the construction, location, and use of the drying-house, the court was fully justified in assuming that there had been an increase of hazard. It is self-evident, and a contrary finding by a jury could not stand.

It follows that if the fire had occurred during the running of the original policy, Dielmann & Co. could not have maintained an action. The increase of hazard would have been a conclusive answer to their suit on the policy. But Herrick, the mortgagee, would have stood in a different position. By the express terms of the mortgage clause, his interest in the policy would not be invalidated by any act or neglect of the mortgagor or owner of the property: *Hastings vs. Westchester Fire Ins. Co.*, 73 N. Y., 141.

The fire occurred February 11, 1882, after the expiration of the original policy, and the plaintiff, who stands in the right of Herrick, the mortgagee, rests his action upon the claim that the policy was renewed and continued for the period of a year from January 19, 1882, by a valid, oral agreement, made at that date between Herrick's agent, Hamlin, and the defendant. It was not denied on the trial that there was an oral negotiation between Hamlin and the defendant to continue the policy, but the latter insisted that it did not result in a final and definite agreement, also that the premium on the renewal was not paid, payment of which by the clause pro-

viding for a renewal, is made a condition precedent to any liability for an extended term. It is unnecessary to pass upon these questions, as we have reached the conclusion that the complaint was properly dismissed on the ground that Hamlin did not, when the alleged renewal agreement was made, disclose to the company the fact that the drying-house had been erected on the premises.

The renewal clause in the original policy contains this provision : "this insurance may be renewed by the payment of premium for extended term, duly receipted for, but in case there shall have been any increase of hazard, it must be made known to the company by the assured at the time of renewal, otherwise this policy shall be void." The mortgage clause also provides that the mortgagee shall notify the company of any increase of hazard which shall come to his knowledge, and if not permitted by the policy, shall pay therefor according to the established rates. The increase of hazard by the erection of the drying-house was known to the broker when the alleged renewal agreement was made. This was conclusively established by his testimony. Upon the well-settled doctrine of agency, his knowledge is imputable to his principal, and Herrick, the mortgagee, was affected with notice of the fact known to his agent, and a failure by the agent to disclose to the underwriter the increase of hazard, put the principal in the same position as if with actual knowledge of the increase of hazard he had personally applied for the renewal and omitted to inform the defendant : *Dupee vs. Norwood*, 10 Jur. N. S., 851 ; *Story on Ag.* (9th ed.), secs. 129, 140. The increase of hazard by an erection made subsequent to the issuing of the original policy and prior to the renewal, was a fact material to the risk, and its disclosure by Herrick, the mortgagee, who procured the renewal, was by the clear language of the policy a condition precedent to a continuance of the defendant's liability. The provision in the mortgage clause that the interest of a mortgagee shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, does not protect the mortgagee's interest in this case, for the reason that it is his own act or default, and not that of the mortgagor or owner, which brings the case within the clause avoiding the policy : *Graham vs. Fireman's Ins. Co.*, 87 N. Y., 69.

It is, however, strenuously insisted by the learned counsel for the plaintiff that there was no proof to justify the assumption made by the trial judge in assigning his reasons for dismissing the complaint, that Hamlin did not at the time of the alleged renewal disclose to the company the fact of the increase of risk, and that the burden of

proving such non-disclosure was upon the defendant. The presumption of law is in favor of innocence and against fraud, and upon this ground it has been held that in an action upon a policy of insurance the plaintiff is not bound in the first instance to prove the truth of representations upon which the policy was issued, and what formed the basis of the contract, but that the burden of proof is upon the underwriter to establish fraud or concealment, although the truth of the representations, or the disclosure of material facts may have been a condition precedent to the insurer's liability : *Fiske vs. New England Ins. Co.*, 15 Pick., 310 ; *Leete vs. Gresham Life Ins. Society*, 15 Jur., 1,161; 2 Green. Ev., sec. 398.

Assuming that the present case is within the principle, we are of opinion that the evidence tended to show that the increase of hazard was not disclosed, and that the plaintiff acquiesced in the assumption of this fact made by the court on the final disposition of the case, and ought not now to be permitted to deny the correctness of the assumption.

The witness Hamlin represented the mortgagee in procuring the renewal. The transaction was between him and the agent of the defendant, no other person being present. The interview was at the office of the company, and from his narration, was very brief, he asking for a renewal and the agent consenting to it. He purports in his testimony to narrate the whole transaction, and no reference is made to any notice having been given of the increased risk. At the conclusion of the testimony the defendant moved to dismiss the complaint on the ground, among others, that the drying-house increased the hazard, and that there was also a change of name without notice to the company.

The trial judge, in deciding the motion, said, among other things, "not only was there no premium paid, but a material increase of hazard that had occurred by the construction of the drying-house, was not disclosed." The plaintiff's counsel did not suggest to the judge that he had misconceived the facts upon which his ruling was based, but contented himself with merely excepting to the order dismissing the complaint. Under the circumstances, we think it is not open to the plaintiff to raise for the first time on appeal, the point that a non-disclosure was not shown.

The conclusion upon the point considered being decisive of the appeal, a discussion of other questions is unnecessary.

The judgment should be affirmed.

All concur.

## UNITED STATES CIRCUIT COURT OF MINNESOTA.

MERRILL

vs.

INS. CO. OF NORTH AMERICA.\*

The policy provided that any change increasing the hazard within the control of or known to the insured and not reported, would avoid the policy. The tenant made alterations increasing the risk.

*Held*, That knowledge that the tenant was making general changes and repairs, did not imply that the insured consented to such as would increase the risk, or that he knew that such were being made. It was for the company to show that the insured knew the character of the improvements; he was not liable for acts of the tenant done without his consent.

The policy provided that an attempt to defraud the company in the matter of a claim, by false swearing or otherwise, should work a forfeiture.

*Held*, That in the absence of evidence of knowledge on the part of the insured of alterations increasing the hazard, omission from the proofs of loss of any statement regarding such alterations was not a false statement which would defeat recovery.

SECOMBE & SUTHERLAND, *for Plaintiff*.

W. D. CORNISH, *for Defendant*.

NELSON, J.

This suit is brought to recover on a fire insurance policy. A jury is waived. Plaintiff introduced in evidence the policy, offered proof of the fire and value of the property, and introduced proofs of loss, and is entitled to a judgment unless the defendant sustains one or more of the defenses urged, which are (1) that there was a change of risk, which rendered the policy void; (2) fraud in proofs of loss. The policy contained these conditions and stipulations:—

“Any change increasing the hazard, either within the premises or adjacent thereto, within the control of or known to the assured, and not reported to

\* Decision rendered, March, 1885.

this company, and agreed to by indorsement thereon, will render this policy null and void. An attempt to defraud the company in the matter of a claim for loss, by false swearing or otherwise, shall cause a forfeiture of this policy, and all claim for loss thereunder."

The stipulation in reference to change of risk must be kept in good faith by the assured, and information of any change in the hazard, and thereby increasing the rate of premium, must be agreed to by the insurer. However, any change increasing the hazard, and rendering the policy void, must be by the act, authority, consent, or cognizance of the assured, or by the consent of her agent.

The building insured was built of stone, with frame office in the rear, and located in the city of Minneapolis, and described in the policy as a storehouse. It was insured for one year from June 19, 1883, and burned February 13, 1884.

The principal testimony relied upon by defendant to defeat a recovery is that of Stevens, the tenant, and Trumbell, the defendant's agent; and it is also urged that the evidence of Merrill, the agent of the assured, indicates that he was aware of the improvements which were made. The changes and alterations in the building, and adjacent thereto, undoubtedly increased the risk, and would render the policy void if known to the agent Merrill; for no information of them was furnished the company, and its assent thereto was not obtained. It is in proof that they were commenced during the last of December, 1883, by Stevens, the tenant. He had temporarily leased the building in the fall of 1882, and on June 19, 1883, had made a definite arrangement for continuing his lease for a year, at which time the insurance policy was written. The property was owned by the plaintiff, who lived in Boston, Massachusetts, and was in charge of the agent, D. B. Merrill, who lived in St. Paul, Minnesota.

The agent visited the tenant Stevens, in December, 1883, or January, 1884, and had a conversation with him, and the effect of it was, as Stevens testifies, that he was about to make changes, and wanted Merrill, before he went south, to come down and see him. Stevens wished to get a lease of the building or an understanding about it, and that was the reason given why he wished Merrill to come down before he went south. He is not certain that it was in a conversation or on a postal card sent to St. Paul that this request was made; but he does testify that Merrill came to Minneapolis, and a conversation took place in front of the building, in which Stevens stated that he was making changes which he considered improvements, and wanted Merrill to lease him the building for another year at \$30 per

month,—the same rent as the previous year,—in consideration of his fixing it up and putting the improvements on it. The improvements talked about “were putting on a shed at the rear,—a roofed shed,—and putting on a new front, and fixing up the windows, and making general improvements.” The changes thus indicated would not necessarily increase the risk, and Stevens is careful to say in his testimony that he don’t recollect whether he spoke definitely about occupying it for any other purpose than he had previously, which was for storage. He never saw Merrill again until after the fire. Some correspondence between the parties is introduced in evidence, but there is nothing in it indicating that Merrill knew or consented to the changes which were made. He went south soon after.

The conversation in December or January was brief. They were together only about ten or fifteen minutes, and did not go into the building; and at that time the office had been moved up from the rear of the stone building to the front, but it does not appear that such change increased the risk, and upon the shed in the rear only the roof had been put on. It does not appear that this was visible to Merrill, or that he knew that it was being built, and Stevens said nothing about it. Merrill denies knowledge of the changes made, except the moving of the office and putting in the window, and that is about all Stevens’ testimony shows he had knowledge of. Trumbell, the company’s agent, fails to show that Merrill knew about the change made by the tenant. It is claimed that Merrill, after the fire, in conversation with Trumbell, admitted that he knew that Stevens was going to make changes, and only refused to allow a reduction of rent in consideration of any alterations made; but he does not admit he knew the character of the changes, and Trumbell is particularly careful to testify that Merrill, the agent, never said that Stevens informed him that he was going to make the changes which he finally did. Stevens had indicated to Merrill what changes he would like to make, which would not necessarily increase the hazard, and are not shown to be of that character. He specified the kind of alterations he was about to make, and, though he spoke of general improvements, it was in connection with the others mentioned. The owner of the building is not liable for the acts of the tenant which would forfeit this policy, unless he has assented thereto.

The tenant could make general changes and repairs, or improvements which did not enhance the risk; and in order to defeat a recovery the defendant must affirmatively prove that these changes,



which the evidence shows did increase the hazard, were made by the consent of the owner, or his agent, Merrill. I think the testimony fails to prove this; for if it is conceded that he knew that general improvements were to be made, the rule invoked by counsel, that a general assent to improvements implies authority to make such as would increase the hazard, does not apply. The defendant, to sustain this defense, must show that Merrill knew the character of the improvements; for it is only "changes increasing the hazard" that must be reported and agreed to.

2. Did the plaintiff make out and swear fraudulent proof of loss? It is urged that in the proofs of loss, the assured should have stated that the tenant had made alterations, increasing the hazard, without her knowledge, and given the situation and position of the property at the time of the loss, and in not doing so she committed a fraud which defeats a recovery. There is no evidence that the assured knew anything about the alterations. She lives in Boston, Massachusetts, and managed the property through an agent. And although she made the proofs of loss, the company do not object on that account. Unless the assured had personal knowledge of the change of risk, and made the proofs of loss for the purpose of defrauding the company, knowing their falsity, there is no fraud. The proofs must comply with the contract obligations of the assured, and fairly state the situation of the property at the time of the loss, within her knowledge; and in so stating, the policy does not require that facts communicated by some one else, about the situation of the property at the time of loss not within her knowledge, should be set forth. A false statement, to defeat a recovery, must be false to the knowledge of the assured, and made for the purpose of defrauding the company. This defense is not sustained by the evidence.

The plaintiff is entitled to judgment for the sum of \$1,578.75; and it is so ordered.

SUPREME COURT OF INDIANA.

NOVEMBER TERM, 1884.

*Appeal from the Marion Superior Court.*

PHENIX INS. CO., OF BROOKLYN, N. Y., )

vs. )

UNION MUT. LIFE INS. CO., OF MAINE.\* )

The policy provided that in the event of the commencement of foreclosure proceedings, or if the risk be increased by any means within the control of the insured without the consent of the company, it should be void. The policy was issued in the name of the owner, payable to the plaintiff mortgagee, with the usual mortgage clause. Shortly after, proceedings to foreclose were begun by plaintiff without the company's consent.

*Held*, That the foreclosure proceedings were not as to the mortgagee an increase of risk which would defeat the policy unless disclosed.

Howe, J.

In this case, the appellees, the Union Mutual Life Insurance Company, alleged in its complaint that the appellant, the Phenix Insurance Company, of Brooklyn, N. Y., on the 20th day of March, 1878, executed and issued its certain policy of insurance in the name of Priscilla J. Death, insuring her, Priscilla J. Death, against loss or damage by fire to the amount of \$1,500, on her one and a half story, frame and shingle-roof dwelling-house, situated on her lot on the southwest corner of Washington and Corey Streets, in Knightstown, Indiana; that such policy was issued in consideration of a premium of \$30, paid to the appellant by the appellee, who was mortgagee of such property, and by the terms of such policy, it was

\* Decision rendered, April 8, 1885.

made payable to the appellee in case of loss; that the appellee was then the holder of such policy, it having been issued by the appellant to the appellee who had, as above stated, a mortgage on such property to secure the payment of \$1,500, then and since unpaid; that such property was destroyed by fire on the 21st day of March, 1878, and the property so destroyed was of the value of \$1,500, and was a total loss, which loss the appellant undertook and promised to pay to the appellee, sixty days after the proof of loss and notice thereof to the appellant; that forthwith after such loss the appellant was notified of the loss, and the terms and conditions of the policy were, in all things kept and performed by the appellee and by Priscilla J. Death, except as to this, Priscilla J. Death having failed and refused to make the proof of loss in her name, the proof of loss was therefore made by the appellee, but such proof was in all things, in substance as required; that after the loss and proof thereof, the appellee inclosed to the appellant a particular statement and account of such loss, etc. And the appellee further alleged that the appraiser appointed to appraise the damage to such property under the terms of such policy, appraised such damage at the sum of \$1,050, and that appellee had been damaged in the sum of \$1,500, which sum remained due and unpaid. A copy of such policy was filed with, and made a part of the complaint. Wherefore, etc.

Appellant answered specially in three paragraphs, numbered respectively the third, fourth, and fifth paragraphs, to each of which the appellee's demurrer, for the alleged want of facts, was sustained by the court. Appellant refused to amend or plead further, and the court upon the evidence assessed the appellee's damages in the sum of \$1,218, and rendered judgment accordingly. On appeal, the general term affirmed the judgment at special term, and from the judgment of the general term this appeal is now here prosecuted.

The only error relied on in argument by the appellant is the sustaining of the demurrer to the third paragraph of its answer. Under the settled practice of this court the other errors assigned in general terms are regarded here as impliedly waived.

In the third paragraph of its answer, the appellant alleged that in and by the terms of the policy in suit, it is provided among other things that, in the event of the commencement of foreclosure proceedings against the premises insured, or if the risk be increased by any means whatever within the control of the insured, without the appellant's consent indorsed on such policy, then and in every such case the policy should become void. And the appellant averred

that, after such policy was so issued, and after the mortgage clause was so inserted for the benefit of the appellee, the appellee caused, without any notice whatever to the appellant, a suit for the foreclosure of such mortgage to be commenced in the Circuit Court of the United States, for the district of Indiana, a court having jurisdiction to hear and determine such matter, and was prosecuting such suit at the time such loss occurred, without the knowledge or consent of the appellant, whereby the risk of loss by fire to such property was greatly increased, and thereby, by the terms of such policy, such contract of insurance became void.

The part of the mortgage clause inserted in the policy in suit for the appellee's benefit, upon which the third paragraph of answer seems to have been founded, reads as follows :—

“It is hereby agreed that this insurance, as to the interest of the mortgagees only therein, shall not be invalidated by any act or neglect of the mortgagor or owner of the property insured, or by the occupation of the premises for purposes more hazardous than are permitted by this policy. It is further agreed that the mortgagees shall notify said company of any change of ownership or increase of hazard which shall come to his knowledge, and that every increase of hazard not permitted by the policy to the mortgagor or owner, shall be paid by the mortgagees on reasonable demand, according to the established scale of rates for the use of such increased hazard, during the then current year.”

The third paragraph of answer proceeds upon the theory that the commencement of the suit by the appellee and mortgagee to foreclose its mortgage, of itself so greatly increased the risk of loss by fire to the property insured as necessarily to avoid the contract of insurance. No authority is cited in support of this theory, and we know of none, and we are certain that under the agreements in the mortgage clause, such a theory can have no application to the case in hand. Here, the appellant stipulated in the mortgage clause that it should be notified by the appellee “of any change of ownership or increase of hazard,” which should come to the latter's knowledge. The appellant was bound to know that, under the laws of this State, if default were made by the mortgagor in the payment of the mortgage debt, the appellee could enforce its mortgage in no other manner than by “foreclosure proceedings against the premises.” While it is true that such foreclosure proceedings might ultimately, after a litigation more or less protracted, lead to a change of ownership of the premises insured, yet, it is equally true that the mere

commencement of such proceedings cannot be regarded in any sense as tantamount to or the equivalent of the "change of ownership, mentioned" in the mortgage clause. Besides, it may be well supposed that if the appellant had desired to be notified of the commencement of foreclosure proceedings, or had supposed that the mere commencement of such proceedings would increase the hazard of the risk, it would have stipulated for such notice in direct terms in the mortgage clause.

The courts cannot assume that the mere commencement of the foreclosure proceedings of itself increased the hazard of the risk in the case before us to such an extent as would, in the absence of notice or consent, avoid the contract of insurance. The facts must be averred from which the inference inevitably follows that the hazard was greatly increased by the commencement of the foreclosure proceedings. The appellant closed the third paragraph of its answer as follows: "Whereby the risk of loss by fire to the property was greatly increased, and thereby, by the terms of the policy, the contract of insurance became void." This is merely the pleader's conclusion, and the paragraph of answer was bad on demurrer, because the precedent facts averred in the paragraph were not sufficient to authorize any such conclusion, either of law or of fact. We find no error in the record of this cause.

The judgment is affirmed with costs.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

OCTOBER LAW TERM, 1884.

WILLIAM L. REED

v.

WASHINGTON FIRE &amp; MARINE INS. CO. }

An agreement to refer to arbitration will not be enforced in equity and will not be sustained as a bar to a suit at law or in equity. But an award can be made a condition precedent of a right of action by making a cause of action arise only upon a promise to pay an award.

It is not unlawful for parties to impose a condition precedent with respect to the mode or time of paying damages or any matters of that kind which do not go to the root of the matter.

The policy provided that the company should pay the amount for which it was liable within sixty days after statement furnished, or replace the property; also, in another place, that in case of dispute as to the amount "it is mutually agreed that the said loss shall be referred to arbitrators \* \* whose decision shall be final."

*Held*, That the liability to pay arose upon the furnishing of the required statement, there was no agreement not to sue, and the submission to arbitration is not a condition precedent to the right of action.

*Held*, That the fact that the form of policy was prescribed by legislative enactment did not conflict with its interpretation as a contract rather than as a statute.

W. ALLEN, J.

It is well settled in this Commonwealth, that an agreement to refer to arbitration will not be enforced in equity, and will not be sustained as a bar to an action at law or a suit in equity: *Rowe vs. Williams*, 97 Mass., 163; *Wood vs. Humphrey*, 114 Mass., 185; *Noyes vs. Marsh*, 123 Mass., 286; *Vass vs. Wales*, 129 Mass., 38; *Eams vs. Clapp*, 123 Mass., 165; *White vs. Middlesex Railroad* 135 Mass., 216. The reason generally given is that such agreements

affect the remedy, and if enforced, would oust the courts of their jurisdiction. Another reason is that a submission to arbitration is a power, and revocable at any time before it is fully executed by an award made. A party will not be compelled to enter into a submission which he can forthwith revoke ; and the bringing of an action amounts to a revocation. Neither of these reasons seems to apply to an action upon a promise to pay an award. Such a promise is conditional upon the making of an award, and the arbitration is a condition precedent to the right of action.

There is no doubt that an appraisal of value, or an award of the amount of damages can be made a condition precedent to a right of action. In such cases the agreement is not to refer a cause of action, but that a cause of action shall arise upon the appraisal or award, which is preliminary to and in aid and a condition of the right of action. *Hood vs. Hartshorn*, 100 Mass., 117, was a case of that kind. Chief-justice Chapman said : "The present case comes within the principle stated by Coleridge, J., in *Avery vs. Scott*, 8 Exch., 500, that it is not unlawful for parties to agree to impose a condition precedent with respect to the mode of settling the amount of damages, or the time of paying it, or any matters of that kind that do not go to the root of the matters." The judgment of Coleridge, J., in the Exchequer Chamber, in *Avery vs. Scott*, was affirmed in *Scott vs. Avery*, 5 H. L. Cas., 811, and the question in such cases has been one of the construction of contracts, whether the agreement to refer in the particular contract under consideration is a condition precedent to a right of action upon the contract, or an agreement to refer a right arising under other provisions of the contract.

In this case the policy provides that in case of loss, a statement shall be rendered to the company, and that the company within sixty days after such statement shall be furnished, shall either pay the amount for which it is liable or replace the property. The furnishing of the statement is the condition upon which the company promises to pay the loss. Not connected with that is the provision that if any difference of opinion shall arise as to the amount of the loss, it is mutually agreed that the said loss shall be referred to arbitrators to be chosen, whose decision shall be final." It is possible for a person who has promised to pay a loss to agree to refer to arbitration questions arising in regard to the performance of that promise. The language of the provision of the policy under consideration aptly expresses that intention, and it cannot be held to

constitute a condition precedent to a right of action for a loss, unless an agreement to refer a loss to arbitration of itself imports such a condition. The agreement is not incorporated with, but is distinct from, the promise to pay the loss and from the provision, which is a condition of that promise, that a statement shall be furnished ; it cannot take effect except with reference to a loss which the company has promised to pay—an existing cause of action ; and it is simply an agreement to refer that matter to arbitration, without any agreement by the plaintiff not to sue. There is nothing to bring it within any of the cases in which a provision to refer has been held to be a condition ; such as *Scott vs. Avery*, ubi supra, *Elliott vs. Royal Exchange Assur. Co.* L. R., 2 Exch. 237 ; *Braunstin vs. Accidental Death Ins. Co.*, 1 B. & S., 782 ; *Scott vs. Liverpool*, 3 DeG. and J., 334 ; *Tredman vs. Holman*, 1 H. & C., 72, in England ; and *Hood vs. Hartshorn*, ubi supra, in this Commonwealth ; but is rather governed by such cases as *Horton vs. Sayer*, 4 H. & N., 643 ; *Roper vs. Lenden*, 1 El. & El., 825 ; *Dawson vs. Fitzgerald*, L. R. 1 Ex. D., 257 ; *Edwards vs. Aberagon Ins. Co.*, 1 Q. B. D., 563, in England ; and *Nute vs. Hamilton Ins. Co.*, 6 Gray, 174 ; *Hall vs. People's Ins. Co.*, 6 Gray, 184, and other cases cited before in this Commonwealth.

It is argued for the defendant that the provision may have more effect to bar the plaintiff's action if construed as a statute, than if regarded merely as a contract. If the legislature prescribes and annexes to a particular right or special remedy, a party is confined to that remedy : *Boynnton vs. Middlesex Ins. Co.*, 4 Met., 212. But this provision is not in form a legislative enactment. It is put forward by the legislature as a contract to be entered into by the parties and to derive its validity from their consent. It is their contract ; as such it does not deprive the plaintiff of his action and his trial by jury ; it is not to be presumed that the legislature intended, by prescribing the form of contract, and prohibiting any other, to give it an effect in depriving a party of such rights which it would not have as a contract.

The discretion of the court, in deciding whether the witnesses to value were qualified to testify in regard to it, was properly exercised, and the evidence admitted was competent.

The other rulings of the court become immaterial.

**Exceptions overruled.**



## LOWER COURT DECISIONS.

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### WHAT PROPERTY IS COVERED BY AN OPEN POLICY.

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*Circuit Court of Shelby County, Tennessee.*

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STEWART, GWYNNE & CO., *use of J. T. Hamblet,*

*vs.*

FACTORS' MUT. INS. CO.\*

An open policy recited that it was intended to cover all shipments belonging to the factors insured or to others, unless otherwise ordered. Cotton was burned, which, through a misunderstanding with the owner, they erroneously thought that they were not bound to insure, but the company had not been ordered otherwise.

*Held*, That the question of what property was covered did not depend upon the opinion of the factors, nor whether the premiums had been paid and entries made as required, but upon the fact whether it was a shipment which they were bound to insure.

*Held*, That the cotton was covered.

This was a suit upon an open policy of insurance for a loss of 102 bales of cotton, burned on the *Josie Harry* in 1883.

The defense of the company was that Hamblet was not insuring under the policy of his commission merchants, and therefore the cotton was not covered by their policy. The facts were very complicated and voluminous, and the court embodied them in a special finding of facts. The following is a summary of the findings:—

1. By Stewart, Gwynne & Co.'s general course of dealing and the general custom of merchants at Memphis, all consignments of cot-

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\* Decision rendered, April, 1885.

ton are to be insured by the factor, unless otherwise instructed by the consignors.

2. By the open policy in this case the defendant undertook to insure all cotton which Stewart, Gwynne & Co. were under obligation to keep insured.

3. By the special course of dealing between Hamblet & Penn, that firm was insured in another company.

4. After the dissolution of that firm, Hamblet shipped the firm's cotton on bills of lading marked, "Insured in Planters' Insurance Company," but shipped his own cotton on bills not so marked.

5. Notwithstanding this, Stewart, Gwynne & Co. erroneously supposed his individual shipments were insured in Planters' Company, and refunded their insurance charges as they did those of Hamblet & Penn. But this fact was unknown to Hamblet, who did not himself inspect the accounts.

6. At the beginning of the new season in 1883, Hamblet wrote a letter to Stewart, Gwynne & Co., saying he would prefer to insure with them if sufficient rebate of premiums could be allowed. They replied, offering him forty per cent, knowing that the Planters' Company had allowed him thirty per cent. To this letter Hamblet did not reply, not thinking it necessary; but the terms being satisfactory, he abandoned the idea of insuring independently, and did not take out a policy in the Planters' Company. Gwynne showed Hamblet's letter to the defendant company and they both anxiously awaited his reply, which not coming, they concluded he was himself insuring elsewhere, and it was so understood between them until the loss occurred and Hamblet wrote to them to collect the insurance.

7. Hamblet intended that Stewart, Gwynne & Co. should keep his consignments insured, and shipped this cotton in the belief that they were doing so, as he had shipped all others since the dissolution of Hamblet & Penn.

8. The policy required Stewart, Gwynne & Co. to report monthly all shipments of the preceding month, and premiums were paid on these reports. The entries showed the aggregate from each port and did not show the names of shippers.

9. All Hamblet's shipments were regularly reported and premiums paid after September, 1883, up to the loss, the premium on which shipment in regular course would not be reported till January following the December in which the loss occurred.

10. But these reports and payments were made from Stewart, Gwynne & Co.'s office without their knowledge or that of Beasley, the defendant's secretary, and while they both understood Hamblet was not insured with them.

11. When the *Josie Harry* was burned, inquiry as to losses developed the fact that Hamblet's cotton had been all reported and paid, but Beasley and Dobbs, the book-keeper of Stewart, Gwynne & Co., agreed to erase all on which the premiums were not paid, and Beasley tendered back all premiums paid, but they were not received.

12. When Hamblet's letter claiming a loss was received, Gwynne notified the company that it would be claimed, restored the erasures, announced he would report the 102 bales in December report, did so, tendered the premium, and made proof of loss, which the company refused to pay.

The 102 bales were shipped on bills of lading which contained no memorandum as to insurance, and without any instructions as to insurance other than such as are to be implied from above facts. It was not insured elsewhere. Hamblet intended it to be insured by Stewart, Gwynne & Co., believed that it was so insured, did not intend to take the risk himself without insurance, and was in ignorance of the fact that Stewart, Gwynne & Co. did not so understand it. Stewart, Gwynne & Co. did not know that such were his wishes, believed they were otherwise, and that he was elsewhere insured, and so did the defendant company.

The insured value of the 102 bales was \$5,610, if covered by this policy.

HAMMOND, J., after reviewing the facts and the evidence.

With this view of the facts, it only remains to consider the legal questions involved. It must be admitted, I think, that the clause of the policy which determines the risk is very ambiguous; and that the practical construction given to it by the dealings under it is exceed-

ingly loose, although it may be very convenient to have it so. But this is the fault of the contract, and not of any court which has to deal with it. It makes no provision within itself for determining whether the risk has attached to any given consignment of cotton. It simply says: "This policy is intended to cover upon all shipments of property belonging to Stewart, Gwynne & Co. or to others, unless otherwise instructed, on good steamboats and model barges, in tow from and to Memphis, Tenn., the said Stewart, Gwynne & Co. to enter on their open-policy book or books and report to this all outward-bound shipments in person or by mail on the day of shipment, and all inward-bound shipments at the termination of each month."

Interpreted by the parties themselves in their dealings with each other, this policy was intended to insure all consignments to Stewart, Gwynne & Co. which they were under obligation to keep insured for their customers, unless the company was otherwise instructed by Stewart, Gwynne & Co. Whether Stewart, Gwynne & Co. were under obligation to insure a customer, depends upon the instructions, expressed or implied, which they had from that customer. They assumed the obligation to insure for all customers every consignment made, unless they were instructed to the contrary. I do not think the reporting or failing to report by Stewart, Gwynne & Co., of any given consignment, or their entry of it, or failure to enter it in the policy-book, has the least to do with the attaching or non-attaching of the risk to any given shipment. That is only a mode of settlement between the policy-holder and the company, and like all settlements of accounts, subject to correction and re-adjustment according to the right as it exists between them. If a risk has attached they must enter, report and pay the premium. If a risk has not attached they need do neither. But if, when a risk has attached, they omit to enter, report, and pay, the failure has not displaced the risk; that remains, whatever they do about entering it, reporting it, or paying it. The company's right to the premium is none the less fixed, and they can be made to pay the premium whenever the facts become known. So, if the risk has not attached, although they enter, report, and pay, the company could never be held for a loss, and might be made to refund any premium improperly entered, reported, and paid, where the familiar circumstances giving the right to recover back money wrongfully paid would exist. The case is not like that of *Hartshorne vs. Insurance Company*, 36 N. Y., 172, cited by plaintiff, nor yet like that of *Douville vs. Ins. Co.*, 11 La. An., 259,

cited by defendant. The distinctions are obvious, and I have found no reported case of a policy and mode of doing business precisely like this. Take this very consignment as an illustration of the construction I give this policy. When the 102 bales struck the deck of the *Josie Harry*, the risk either attached or it did not, and whether it did or not depends on facts then existing. If the policy had prescribed, or the course of dealing had determined that the risk attached or did not attach, according to some mark or stipulation placed upon or in the bill of lading by the shipper, it would depend only on the appearance of the bill of lading, and we need look no further. But neither the policy or the course of dealing prescribes any such wise method of knowing whether the consignment comes within the policy. The general rule is that all Stewart, Gwynne & Co.'s consignments come in "unless otherwise instructed," whatever that may mean. By the course of dealing it means that Stewart, Gwynne & Co. advised their customers that all their consignments will be charged by them for insurance at whatever rate they fix by contract or is customary, and that they will cover the risk by their own mode of insurance, whatever that may be, and they are free to make it as they please. As between them and Hamblet, therefore, they are bound to keep him insured unless he has instructed them to the contrary, not necessarily by the bill of lading, but in any way; not necessarily by express or special instructions, but it may be by such as can be fairly implied from the course of dealing between them. It does not depend in any sense upon any vague or fluctuating, open or secret intention of Hamblet, but upon the fact then existing of his instructions, or absence of instructions, about insurance. On the facts of this case as we have found them, Hamblet had never expressly or impliedly given Stewart, Gwynne & Co. any instructions not to insure this shipment or any other; and therefore, coming under the general rule, as between Hamblet and Stewart, Gwynne & Co., the latter were bound to keep him insured in any way they saw proper. He did not, and need not, concern himself as to the mode.

Now, turning to Stewart, Gwynne & Co., they had provided by this very policy to discharge the obligation they were under to Hamblet and all their other customers. That was its object, and as a plain matter of contract it was the business of the insurance company to assume every risk that Stewart, Gwynne & Co. were bound to protect, and that contract inures to the benefit of the shipper. As between Hamblet and the underwriters, what does it concern him

whether Stewart, Gwynne & Co., who alone were trusted for the premium, carried out their obligation or not, whether they reported or not, or whether they were doing these things or not doing these things by mistake or dishonest design? That is a question between the insurance company and Stewart, Gwynne & Co., whom they trust. If they fail to enter and report, or fail to pay, they may be made to enter and report, and to pay by appropriate remedies to enforce the contract, but none of this can affect the fact that when the cotton struck the deck of the *Junie Harry*, the risk then and there attached to it, and continued to protect it, whether the premium was then paid or under the contract would not be due for a month, whether it was entered or thereafter to be entered, reported, or to be reported, and no matter whether as a fact these things were neglected or not. But I do not agree with counsel for plaintiff that Stewart, Gwynne & Co. could not withdraw this protection from any customer. I have no doubt they might. If they had notified the defendant not to insure Hamblet on this or any of his consignments, the company would have been "otherwise instructed," and the risk would not have attached, no matter how much Stewart, Gwynne & Co. were under obligation to keep Hamblet insured. His remedy would then have been against Stewart, Gwynne & Co., for damages for failing in their obligation to keep him insured and not on this policy. But they never so instructed the company, either expressly or impliedly. They did not intend to exclude Hamblet's shipment, neither Beasley or Gwynne. On the contrary, they were doing all they could to get him to come under the policy. They both erroneously thought that Hamblet had excluded himself, which was not a fact. He was not responsible for this error; but suppose he was, it was only a mistaken belief of the existence of a fact which had no existence, and we should judge according to the fact as it was and not as Gwynne and Beasley erroneously supposed it to be, unless they acted on that error to the damage of the defendant in some more substantial way than a repeated expression of their mutual belief in the existence of a fact which had no existence. That which they did cannot be distorted into a deliberate contract to cancel this policy as to Hamblet, or what is the same thing, a deliberate intention by Gwynne to exclude him, and thereby leave him without insurance. Neither dreamed of doing that, but only entertained a firm belief and understanding with each other that Hamblet had kept himself insured elsewhere, in which they were mistaken.

On this theory of the rights of the parties it is, of course, imma-

terial whether Hamblet's consignments were, by reason of Gwynne's and Beasley's mistake of a fact, reported and paid for or not; nor whether they were erased or not, but it strengthens the case to know that, notwithstanding the error, no harm was done the defendant company, because "Dobb's young man" blundered on the truth, and as a fact reported all Hamblet's consignments, and the premiums were properly entered and paid, everything being done that would have been done if no mistake had occurred. But I do not place my judgment on this fact, and if the case were not otherwise for the plaintiff, would unhesitatingly say that reporting and paying the premiums would not bind the defendant to any risk, where in fact, by express or implied instructions, Hamblet had "otherwise directed," or where Stewart, Gwynne & Co. themselves had, by mistake or design, "otherwise instructed" as to Hamblet's consignments. The instructions asked by plaintiff's counsel will be adopted, except as modified by this opinion.

Judgment for plaintiff.

TITLE TO COMMISSIONS AFTER TERMINATION OF  
AGENCY.

Cincinnati (O.) Superior Court.—General Term.

TRIMBLE

vs.

CONN. MUT. LIFE INS. CO.

A contract of insurance agency, which fixed no term, provided that the agents should devote their entire time and attention to canvassing and soliciting, collecting premiums on policies delivered to them, or to their sub-agents, and should perform all other services pertaining to or necessary for the prosecution of the company's business, and that in consideration of the performance of such duties, the company should "allow and pay them a commission of twenty-five per cent on all the first premiums, collected by them or their agents upon policies received from them, and ten per cent for each year for four years on the subsequent or general premium thereon."

*Held:* That after the termination of the agency by the act of the company the agent was not entitled to such commissions on renewals.

STALLO, KITTREDGE & WILBY, *for Plaintiff.*

JORDAN, JORDAN & WILLIAMS, *for Defendant.*

Plaintiff, as assignee of George W. Fackler, late one of the general agents of defendant, sues for an account of premiums collected by it within four years after the termination of such agency, upon policies secured by Fackler during its continuance, claiming that by the terms of Fackler's contract he was entitled to commissions on renewals of such policies for four years, without regard to the continuance of his agency, which was at will.

After hearing the evidence and argument by plaintiff's counsel, the court decided as follows:—

HARMON, J.

It has been manifest since my mind first got possession of this case, that it turns on the construction of this contract. The plaintiff,



to succeed, must certainly establish the proposition that by its terms he obtained, while the agent of the company, a vested right to renewal premiums, and to unpaid portions of first premiums, which fell due after his agency terminated, it being admitted that the company had the right, with or without cause, to terminate the agency when it pleased.

Assuming that the contract is sufficiently indefinite to justify the court in looking to the subsequent conduct of the parties, to determine whether they have, by mutual assent, whether evidenced by conduct or language, put a construction upon it, we will look at that first.

There were three occasions when it might naturally be expected that the construction of his contract would have been a subject of consideration, for of course the fact that the one party or the other did not contend for a certain construction, would have no weight unless the occasion would naturally call upon him to do so.

The first one was when Rochester transferred his interest in the contract to Fackler. It is contended for plaintiff that the fact that a transfer was made showed that Fackler must have had in mind the construction now contended for by the plaintiff, and that the transfer being sent to the company and at least tacitly assented to by it, it must be held to have known that Fackler made this claim. But I do not think that the transfer necessarily had anything to do with the right to commissions after the agency terminated. It may naturally be accounted for otherwise. Neither Rochester nor Fackler nor the company had in view a termination of the agency. What all the parties had in view was Rochester's going out, and Fackler's staying in. If Rochester had made no assignment of his right to Fackler, the company, if they had separated, might not have been justified in paying to Fackler alone any of the commissions upon premiums which it may have received directly. It was bound to pay such commissions to the firm; and the right to continue in the business, and to earn commissions may have been fairly a subject of transfer, especially when we consider that the company, having bargained for the services of both, could not be expected without its consent to put up with the services of one.

The second occasion was when the company desired to separate Indiana from the agency created by this contract, and a correspondence took place between the parties, which resulted in giving Indiana to another agent, and in some agreement between Fackler and that other agent as to the division of commissions on renewals

upon policies obtained while Fackler held the agency for that State. The parties were not here considering what the rights of either would be if the agency were terminated. The agency for both States was an entirety so long as Fackler continued to act for the company, unless he consented to divide it. The testimony shows that the relations of the parties were satisfactory, the company did not of course desire to offend an agent it wished to retain, and the object of the correspondence was to see if they could not agree upon some terms upon which Fackler would be willing to act for Ohio alone and let Indiana go. Fackler, wishing to do as well as he could for himself in the bargain, naturally wanted what the new agent was willing to concede, at least a share in an easily earned commission on renewals upon policies which his labor and that of his agents had secured for the company. Of course, Fackler had a vested right in these, provided his agency continued. I am sure that in the amicable attempt to modify their agreement, neither party had any thought of what would be the effect if the company terminated the entire agency.

The third occasion was when the agency ended. I have not heard what counsel might have to say on that subject, but it is perfectly manifest that that of all times is the one when we would expect something to be said upon the subject, first, because the event had come which would bring it to the minds of the parties; second, because Fackler was then found to be in arrears; third, because he was put to the humiliation of calling upon a relation, and that not a blood relation, to let him have money to pay the company. The fact was well known that interests of this sort have an ascertainable value by the tables of actuaries, and it seems to me that if we were to concede that what occurred on the other two occasions bears in favor of the plaintiff, the fact that Fackler did not on this occasion allude in any way to this claim or seek to have its value taken by the company as a part of his large indebtedness, would overcome it, and that the plaintiff is being given the benefit of every doubt if the court shall say that he comes out even on the question of the conduct of the parties. So that we are put back at last to look at the agreement simply in the light of its own terms.

It must be admitted that this agreement, like a good many others drawn by persons with a little learning so dangerous in the law, has upon casual reading a sound of great profundity and clearness, but is really open to attack for obscurity, and that obscurity, as is often the case, arises from too great a display of words of legal smack.

Counsel for plaintiff, with great ingenuity, have taken advantage of these things and certainly have raised some doubt, if we are to look at the contract as they look at it. But it seems to me they have failed to do what, by the well-known rule of construction, courts are enjoined to do, take the contract by the four corners, consider it as a whole.

The points made by counsel are that when the contract reaches the point where the compensation of Fackler is provided for, it is so worded as to appear that his collection of some premiums is the condition upon which he is to receive a commission thereon, but that upon other premiums he was to have commissions whether he collected them or not. In the first place, I am not prepared to say that this is true. It is only a very critical reading that would suggest it. The said company stipulates and agrees "to allow and pay the said George Fackler & Co., a commission of twenty-five per cent on all the first premiums collected by them or their agents upon policies received from them, and ten per cent for each year for four years on the subsequent or renewal premiums thereon," etc. Assuming what may be, and I think perhaps is, the case, that there was an intent in the location of the phrase, "collected by them," does it follow that such intent was that the agent was to have a commission on renewals after his agency ceased, it being provided that it might cease whenever the company so wishes? It is not equally referable to an intention to allow the agent his commission in cases where the insured might transmit his premium directly to the company, as would very probably be the case, for instance, where extra premiums were paid, they being, as the testimony shows, a special additional premium paid for a risk not contemplated by the policy. It seems to me that one is as fair a construction as the other, that both would hardly be contended for, and that we must remember that we naturally expect men, when they are providing for what the one is to do and the other to pay, to have in mind only the state of affairs while the contract continues, and that a stipulation for something after the contract is ended is not ordinarily to be looked for except in express terms. It is conceded by counsel that the only effect of the location of the phrase, "collected by them," in the next clause, relating to the commissions on premiums on policies existing when the contract was made, only has the effect of giving the agent the commissions, although the premium should not pass through his hands, and that fact strengthens the view that such was the only effect of the clause in ques-

tion, considering the principle I have already spoken of, that parties are supposed to be stipulating, unless the contrary appears, for the time covered by the contract, and not for something to happen afterwards.

I am unable to discover any particular meaning in the use of the words, "allow and pay," as contended for by counsel. In the first place both words are proper in the view just taken, that first premiums being always collected by the agent, the term "allow" would naturally apply to them as well as to all other premiums collected by him, and as the parties contemplated the payment of some premiums directly to the company, the use of the word "pay," also would be proper. But if that be not true it is only a part of that verbiage which is well illustrated in the use of the pompous terms "stipulates and agrees." It certainly could not be contended that there is anything but a desire to spread himself to be seen in the use by the writer of both of those terms.

Now this being the case, it seems to me that it would be straining a point to say, if we look along further, that the intent of this contract was to provide that the agent was to have something after the agency terminated. But looking at the entire contract, it seems to me perfectly clear that the parties had no such thing in view, and why? The language of the undertaking on each side is as follows: "Fackler & Co. agree to devote their entire time and attention in a faithful and industrious manner to the general business of life insurance for said company in said States, in canvassing and soliciting in said States, collecting premiums on policies delivered to them or their sub or local agents," etc.

The parties do not then proceed to provide separate payments for these separate services. They do not say the agent shall have so much for getting the application, so much for collecting the premiums, but they say expressly: "In consideration of the faithful performance of the aforesaid duties by said George W. Fackler & Co.," they shall receive the stipulated commissions.

It is true, sometimes, where a number of things, whether articles to be delivered or services to be rendered, are specified, and afterwards a series of compensations therefor are provided, that the maxim, *singula singulis reddenda*, is to be applied, but it seems to me absolutely impossible to do so here because the sums to be ascertained by a certain percentage or commission are expressly stated to be the payment, not only for all the specific things to be done by Fackler as stated above, but for "all other services pertain-

ing to and necessary for the successful prosecution of the business" of the company in Ohio and Indiana. That being the case, it seems to me perfectly plain that what the parties were specifying, what he should do on the one hand and what they should pay him for it on the other, while the agency should continue, and that it is impossible by fair construction to find in the contract the meaning contended for by the plaintiff, viz: that the intent of the contract was, that for getting applications of insurance in this company the agent was to be entitled to twenty-five per cent upon the first premium, and ten per cent on renewals for four years, regardless of the continuance of the agency.

This seems to me to settle the controversy. It may be said that it is eminently fair that the company should continue to pay. It may be said it is a hardship on the agent, after having sowed the seed with much toil, not to be permitted to pluck the fruit when the plucking is comparatively easy. But the answer is, that where parties make a contract they stand or fall by it, and if Fackler intended to secure to himself such a right it was easy to say so. He might have done it by separating the various commissions provided for and making each a payment for some specific service: If the contract provided that for getting the insurance he should have twenty-five per cent upon the first, and ten per cent upon subsequent premiums for four years, he would have a vested right which would survive the termination of his agency, but those amounts being named as what he is to get for everything he was to do as agent, he cannot say he is entitled to them after his agency has ceased, and he can no longer render the services for which they were to be the reward.

I am sorry now that this view has so ripened in my mind as to lead me to decide the case without hearing from counsel for the defense, that argument was not insisted upon at the time the motion for a nonsuit was made, but at that time I did not fully grasp the entire scope of this contract, which I had only heard read over once.

Judgment for defendant.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

APPLICATION.

§ 106. LIFE.—*Answers as Representations or Warranties.—Effect of False Answers.—When Filed in by Agent.*—The materiality of warranties is not open to consideration, but in case of doubt the court will construe answers as representations. Answers to specific questions which are fraudulent misrepresentations, will work a forfeiture. But answers which could only be made to the best of knowledge or belief will not work a forfeiture if made in good faith. Answers filled in by the agent on his own responsibility will not be regarded as made by the insured.

*Schwarzbach vs. Ohio Valley Protective Union.*

op'd Jour'l, p. 518.

W. VA. C. A.

## BENEVOLENT ASSOCIATION.

§ 107. *LIFE.—Who may be Beneficiaries.—Compensation of Trustees.—Ouster in Case of.*—Associations organized under the provisions of the law embodied in the Revised Statutes, section 3,630, “for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members,” are not authorized to issue certificates of membership payable to the named beneficiaries “or assigns,” nor payable in case of death to others than the family or heirs of the insured member. Trustees of such associations, having voted to themselves and accepted designated sums of money, as compensation for their services for particular years, have no power, in subsequent years of their service, to vote themselves “back pay” for their services during such former years. Such trustees have no authority, by virtue simply of their trusteeship, to act for or bind their association, except in their aggregate and administrative capacity as a board; and where they assume, by virtue of their trusteeship, to act in the separate and individual capacity of treasurer, secretary, or as general or special agent of their association, they cannot thereby create against it a legal liability to compensate them as trustees for such services. Such trustees, unless especially invested with the additional capacity and authority of officers or agents, are limited in their claims to compensation to such sums as will reasonably compensate them for the time and expense incurred in going to, attending, and returning from, their official meetings, and for their services while in session. Whether a corporation which is shown, upon a quo-warranto proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it.

*State vs. People's Mutual Benefit Association.*

*Pepp'd Jour 1, p. 506.*

O. S. C.

## BENEVOLENT SOCIETY.

§ 108. *LIFE.—Construction of Charter.—Who may be Beneficiary.—Rights of Beneficiary.*—The charter of the Supreme Lodge Knights of Honor, which provides for the payment of a

sum of money upon the death of a member, "to his family or as he may direct," has been correctly construed by the order as allowing the member to designate as his beneficiary any person, whether a member of his family or not. The privilege thus reserved to the member is a power of appointment of the recipient of a fund, which power is revocable, with the consent of the order and in conformity to its rules and regulations, at the will of the member who has made such an appointment. The beneficiary thus appointed by a member of the order has no vested interest in the fund by reason of the appointment, but takes an interest subject to the power of the member to revoke the appointment, with the consent of the order, and in conformity to its rules and regulations.

Highland vs. Highland (Ills.), 16 Chi. Leg. News, 272; Tennessee Lodge vs. Ladd, 5 Lea, 716; Supreme Lodge vs. Martin, 12 Ins. L. Jour., 628; Dorian vs. Central Verein, 7 Daly, 168; Swift vs. Conductors' Asso., 96 Ills., 309; Splawn vs. Chew, 60 Texas, 532; Hellenberg vs. I. O. B. B., 94 N. Y., 580; Relief Asso. vs. McAuley, 2 Mackey, 70; Van Bibber vs. Van Bibber, 14 Ins. L. Jour., 290; Duvall vs. Goodson, 79 Ky., 224. Distinguishing Masonic Ins. Co. vs. Miller, 13 Bush., 489; Weisert vs. Muehl, 5 Ky. Law Rep., 285; Hallan vs. Gardner, 5 id., 857.

*Gentry vs. Supreme Lodge Knights of Honor.*

Rep'd Jour'l, p. 463.

IND. U. S. C. C.

## CONTRACT.

§ 109. FIRE.—*To Keep Property Insured.—Effect of Breach.—Appeal in Case of.—Evidence.—Mortgage Clause.—Waiver.—Limitation.*—Where suit is for a breach of contract for failure to keep insured property to the value of \$125,000, it comes within the Illinois statute, allowing appeals where over \$1,000 involved.

Morris vs. Preston, 93 Ill., 215.

Testimony of the writer as to his motives in writing certain letters regarding a claim put in evidence, is inadmissible. Instructions as to the construction of a mortgage-clause in a mortgage, with relation to keeping the property insured, and its being of no effect in such a suit as the above, were irrelevant, but if they worked no harm, will not call for a reversal. Where parties who have agreed with the owner to keep the property insured, fail to do so, the owner cannot with knowledge



of the failure, stand idly by and then, for the first time, after a loss, claim indemnity for a breach of contract; he should have procured such insurance for himself. If in the face of such an agreement, the owner during two consecutive years, assumed the duty of procuring insurance for himself, he thereby released the parties who had agreed to procure it, from further obligations to do so. Failure to comply with such agreement is barred by statute of limitations after five years, although the contract be a continuing one.

*Brant vs. Gallup.*

Rep'd Jour'l. p. 497.

ILL. S. C.

### DESCRIPTION.

§ 110. MARINE.—*Of Shipping Lin., in Case of Chartered Vessel.*—Where an insurance certificate, issued under a policy of marine insurance, described the goods as "shipped on board of the Great Western Steamship Company," Held, That shipment upon a vessel not owned by the company, but chartered by it and placed upon its line as one of its vessels, satisfied the terms the contract.

*Croswell vs. Mercantile Mut. Marine Ins. Co.*

Rep'd Jour'l, p. 538.

MINN. U. S. C. C.

### EVIDENCE.

§ 111. LIFE.—*Failure to Produce Proofs of Death.*—*Indorsements on Proofs.*—*Declarations of Insured as to Sickness.*—*Hypothetical Questions as to Sickness.*—Proofs of death when required as a prerequisite of payment must be shown to have been furnished in order to recover. Evidence of issuing of policy and of refusal to pay claim without objecting to proofs, is admissible, although proofs of death are not produced, and it is not shown that an offer to deliver up policy on payment of claim according to its terms had been made. Indorsements on proofs showing when they were delivered are proper evidence, though the proofs themselves are not read to the jury. Declarations of insured as to previous sickness are hearsay and inadmissible. Hypothetical questions to experts as to the effect of certain disorders are properly disallowed.

*Schwarzbach vs. Ohio V. & P. Co. & P. Co. & P. Co. & P. Co.*

—1101.

## EVIDENCE.

§ 112. *LIFE.—Construction of Statute as to Privileged Communications to Physician.*—The New York statute making information acquired by the physician in his professional capacity privileged and prohibiting its disclosure unless expressly waived by the patient, is founded on public policy, and its provisions cannot be waived except as expressly provided. The prohibition remains in force after the death of the patient as well as during his life, and an executor or administrator is not a personal representative of the patient in such a sense as to authorize him to waive it. He represents simply in respect to rights of property.

*Edington vs. Mutual Life Ins. Co.*, 67 N. Y., 185; *Edington vs. Aetna Life Ins. Co.*, 77 N. Y., 564; *Pierson vs. The People*, 79 N. Y., 424; *Gratton vs. Metropolitan Life Ins. Co.*, 80 N. Y., 281; *Bowman vs. Norton*, 5 C. & P., 177.

*Westover vs. Aetna Life Ins. Co.*

Rep'd Jour'l, p. 522.

N. Y. C. A.

## ORAL CONTRACT.

§ 113. *FIRE.—Subsequent Written Policy as Evidence of Terms.*—Defendant, by oral agreement, insured plaintiffs' property, a written policy to be subsequently issued. A loss occurred, and afterwards defendant made and delivered to plaintiffs a written policy. *Held*, That the policy, as against plaintiffs, was not conclusive as to the terms of the insurance, but was only evidence as plaintiffs' admission of those terms, and might be rebutted by proof of the oral agreement. Where there is an oral contract of insurance, a policy to be subsequently issued, and nothing is said about conditions, it is presumed that the parties intended to have inserted in it the conditions usual in such cases, or such as have been before used by the parties. That a particular condition is usual must be shown by the party who insists on it.

*Salisbury vs. Hekla F. Ins. Co.*

Rep'd Jour'l, p. 550.

MINN. S. C.

## PARTNERSHIP.

§ 114. *FIRE.—When a Question for the Jury.*—It is not error to leave to the jury the question of partnership inter se, the ev-

idence tending to show a purchase of a stock of goods in a store by one, and his employment of another, who had no interest in it, to conduct the business for half the net profits, being responsible for half the losses by bad debts.

*Pittsburgh Ins. Co. vs. Frnzee.*

Rep'd Jour'l, p. 512.

PA. S. C.

### PLEADING.

§ 115. FIRE.—*Effect of Demurrer.—Error in False Representations.*—Where plaintiff elects to stand upon a demurrer, and facts are thus admitted which constitute a complete answer, nothing more is left to try, and an appeal will lie from the ruling on the demurrer. The court will not, in order to find a way for reversal, go outside the record in case of supposed blunder in the pleadings, and base a ruling upon a supposed intention of the pleader. The question is not free from difficulty whether an insurance company can set up the falsity of representations other than those which have been reduced to writing.

*Ellis vs. Council Bluffs Ins. Co.*, 20 N. W. Rep., 782.

*Wallace vs. Council Bluffs Ins. Co.*

Rep'd Jour'l, p. 489.

IOWA S. C.

### POLICY.

§ 116. LIFE.—*Waiver of Forfeiture.*—The issuing of a policy or continued receipt of premiums after knowledge of facts which would work a forfeiture, will operate as a waiver.

*Schwarzbach vs. Ohio Valley Protective Union.*

—§§ 106, 111.

### PREMIUM.

§ 117. LIFE.—*General Agent may Waive Payments.*—Although in the printed policy and the application for life insurance it is stated that no policy will be considered valid and binding until the premium is paid, a general agent of a foreign company may waive such condition and give credit; and as the evidence in this case shows that the delivery of the policy in suit was unconditional, and that the agent did in fact waive the terms thereof requiring prepayment, the policy should be held valid, and plaintiff allowed to recover the amount of insurance,

with interest, after deducting the amount of premium due and unpaid.

*O'Brien vs. Union Mutual Life Ins. Co.*

*Rep'd Jour'l*, p. 542.

*MINN. U. S. C. C.*

#### PREMIUM NOTE.

§ 118. FIRE.—*Failure to Pay Interest Suspends Policy.—Failure of Notice.*—Where, in accordance with the charter, the policy and by-laws prescribed that the policy should be suspended in case of non-payment of interest on any premium-note and not considered binding until such interest be paid, but that the defaulting member should be bound for any assessment in the mean time to pay losses, no recovery can be had for a loss while such interest is in default. Failure on the part of the company to send the customary notice as to time of payment, will not excuse the non payment.

*Mutual Fire Ins. Co. vs. Miller Lodge*, 58 Md., 463 ; *Doster vs. Ins. Co.*, 106 U. S., 30.

*Webb vs. Mutual Fire Ins. Co.*

*Rep'd Jour'l*, p. 534.

*MD. C. A.*

#### PROHIBITED RISK.

§ 119. FIRE.—*Keeping and Storing.—Gunpowder.—Effect of Usage.*—A policy on a stock of goods "usually kept in a country store," with printed condition to be void if gunpowder be kept in the building, and printed permission to merchants accustomed to deal in it to keep it for sale in a limited quantity, is avoided by keeping it in excess of such quantity, notwithstanding a usage to keep it in such stores in greater quantities.

*Distinguishing Franklin F. Ins. Co. vs. Updegraff*, 7 Wright, 357 ; *Citizens Ins. Co. vs. McLaughlin*, 3 P. F. Smith, 485.

*Pittsburgh Ins. Co. vs. Frasee.*

—§ 114.

#### REINSURANCE.

§ 120. FIRE.—*Effect of Misdescription.—Arbitration Clause.*—The P. company issued a policy on a "one and one-half story, hard-finished, frame boarding-house," and subsequently reinsured part in the S. company under the same description. The P.

company having resisted payment on the ground that only the lower story was hard-finished, was defeated. *Held*, That the S. company was liable to the P. company under the reinsurance contract whether the description was true or false, so long as it was made by the P. company in good faith. It insured the interest of the P. company, and its liability was determined by the liability of reinsured. It was not open to the reinsurer to inquire into the merits of questions between the insured and the original insurer. *Held*, That the arbitration clause has no force in a contract of reinsurance, there is nothing to arbitrate since the liability is fixed by the liability of the original insurer.

*Jackson vs. St. Paul F. & M. Ins. Co.*

Rep'd Jour'l, p. 546.

N. Y. C. A.

#### REINSURANCE.

§ 121. FIRE.—*Misdescription of Location*.—Where a contract of reinsurance confines the location of the risks within certain limits, then there can be no recovery for a risk located outside of said limits, which is erroneously stated to be within said limits in the schedule of risks accompanying the policy of reinsurance.

*London & Lancashire Fire Ins. Co. vs. Lycoming Fire Ins. Co.*

Rep'd Jour'l, p. 530.

PA. S. C.

§ 122. LIFE.—*Breach of Oral Representation*.—The failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct and as to the amount it would keep at risk, made without fraud or falsehood, before the policy was issued, and not alluded to therein, is not a valid defense against the insurer's liability upon the policy.

*Ins. Co. vs. Mowry*, 96 U. S., 544; *Kimball vs. Aetna Ins. Co.*, 9 Allen, 540; *Alston vs. Mechanics' Ins. Co.*, 4 Hill, 329; *Mayor of N. Y. vs. Brooklyn Ins. Co.*, 43 N. Y., 467; *Bryant vs. Ocean Ins. Co.*, 22 Pick., 200; *Trail vs. Baring*, 3 Big., 233.

*Prudential Ins. Co. vs. Aetna Life Ins. Co.*

Rep'd Jour'l, p. 528.

CT. U. S. C. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## SUPREME COURT OF IOWA.

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*Appeal from Cedar District Court.*

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WALLACE

vs.

COUNCIL BLUFFS INS. CO.\*

Where plaintiff elects to stand upon a demurrer, and facts are thus admitted which constitute a complete answer, nothing more is left to try, and an appeal will lie from the ruling on the demurrer.

The court will not, in order to find a way for reversal, go outside the record in case of supposed blunder in the pleadings, and base a ruling upon a supposed intention of the pleader.

The question is not free from difficulty whether an insurance company can set up the falsity of representations other than those which have been reduced to writing.

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\* Opinion filed, April 24, 1885.

Action upon a policy of fire insurance. The defendant, for answer, pleaded certain verbal representations, which it alleged were false and fraudulent. It also pleaded that the plaintiff failed to make preliminary proof as required, and pleaded some other matters. It did not set out a copy of any application or representation, nor show that any copy was attached to or indorsed upon the policy. The plaintiff demurred to six divisions of the answer, in some of which were set up the alleged false and fraudulent representations; the demurrer being based upon the ground that no copy thereof had been attached to or indorsed upon the policy. The court overruled the demurrer, and, the plaintiff electing to stand upon his demurrer, judgment was rendered against him for costs. The plaintiff appeals.

C. E. WHEELER and W. G. THOMPSON, *for Appellant*.  
PHILLIPS & DAY, *for Appellee*.

ADAMS, J.

1. After the plaintiff had elected to stand upon his demurrer, a question arose as to the proper practice. The defendant insisted upon proceeding to trial upon that portion of the answer not demurred to. But the plaintiff refused to proceed, and judgment was rendered against him for costs, as above set forth. The defendant now insists that the action was disposed of in such a way that an appeal merely from the ruling on the demurrer does not lie. But it appears to us that after the ruling upon the plaintiff's demurrer, and after the plaintiff's election to stand upon the demurrer, there was nothing left for the district court to try. As the case then stood, the plaintiff was wholly defeated. Facts stood admitted which were a complete defense, and while they so stood the plaintiff by no possibility could have judgment against the defendant. By electing to stand upon the demurrer, he conceded that judgment must go against him, and that it must stand against him unless, upon appeal, he could secure a reversal. The case, so far as the district court was concerned, was finally disposed of. The defendant had no occasion nor right to ask to be allowed to defeat the plaintiff again, and have another judgment for costs, in anticipation that the plaintiff might appeal, and by an appeal secure a reversal. If so much of the defendant's answer as was not demurred to showed a good defense, that defense remained available to the defendant when it should be needed.

2. We come now to the questions raised by the demurrer. And

here we find ourselves somewhat perplexed by the fact that there is a portion of the answer demurred to, to which the demurrer does not seem to have any application, and yet such fact is not noticed in the arguments of counsel. The fifth division of the answer is demurred to, and that division is in these words: "That, as a condition precedent to the right of recovery under said policy, it is provided therein that persons sustaining loss or damage by fire shall forthwith give notice of said loss to the company, and as soon thereafter as possible render a particular account of such loss, signed and sworn to by the assured, and stating the actual cash value of the property, and the interest of the assured therein. \* \* \* And the defendant says that the plaintiff utterly failed to furnish statements or proofs so required, or any proofs." The ground upon which the demurrer is based is set out in these words: "That said defenses set out and allege certain representations of the assured which defendant alleges were made at the time the policy sued upon was issued, and for the purpose of procuring said insurance; and also allege that the representations were false; but do not allege or show that such representations, or any part thereof, were by defendant attached to or indorsed upon said policy, or a true copy of the same." The fifth division of the answer does not set up the falsity of any representations, but a failure to make preliminary proof. That division was not demurrable upon any such ground as stated, nor are we able to see that it was demurrable upon any ground. Possibly the plaintiff did not intend to demur to that division. But we do not feel justified, in order to find a way to a reversal, to disregard the record and base a ruling upon a supposition that the plaintiff intended something different from the record. It would be going quite far enough to base a ruling upon the supposed intention of a pleader in contravention of the pleading, if the ruling, when made, would sustain the judgment of the court below.

Taking, then, the demurrer as it reads, we have to say that, so far as the fifth division of the answer is concerned, the demurrer was unquestionably rightly overruled. The plaintiff, by demurring, admitted the facts stated in that division, and by electing to stand upon his demurrer, he admits them in this count, and we are asked to say whether, with those facts admitted, judgment should stand against him. It must be conceded that if we confine ourselves to the record, as we hold that we must, the judgment must stand.

As to the question whether an insurance company can be allowed to set up as a defense the falsity of representations other than those



which have been reduced to writing, and a copy thereof attached to or indorsed upon the policy, it is manifest that, under the view which we have taken, the case does not call for an opinion. The question is not free from difficulty unless it should be regarded as settled, as perhaps it should be, by *Ellis vs. Council Bluffs Ins. Co.*, 20 N. W. Rep., 782.

**Affirmed.**

## UNITED STATES CIRCUIT COURT OF INDIANA.

MADELEINE GENTRY ET AL.

vs.

SUPREME LODGE KNIGHTS OF HONOR.\*

The charter of the Supreme Lodge Knights of Honor, which provides for the payment of a sum of money upon the death of a member, "to his family or as he may direct," has been correctly construed by the order as allowing the member to designate as his beneficiary any person, whether a member of his family or not. The privilege thus reserved to the member is a power of appointment of the recipient of a fund, which power is revocable, with the consent of the order and in conformity to its rules and regulations, at the will of the member who has made such an appointment. The beneficiary thus appointed by a member of the order has no vested interest in fund by reason of the appointment, but takes an interest subject to the power of the member to revoke the appointment, with the consent of the order, and in conformity to its rules and regulations.

Suit on benefit certificate, for \$2,000.

The charter of the defendant, the Supreme Lodge Knights of Honor, granted by the legislature of the State of Kentucky, in 1876, empowered it to establish and conduct a widows and orphans' benefit fund, from which, on satisfactory evidence of the death of a member of the order who had complied with all its lawful requirements, "a sum not exceeding \$5,000 shall be paid to his family, or as he may direct."

At the institution of the order, in 1873, the members thereof, by their constitution, stated one of the "objects of the order" to be, "to establish a benefit fund, from which a sum not to exceed \$2,000, shall be paid at the death of each member to his family, or to be disposed of as he may direct." In 1877, this clause of the

\* Decision rendered, April 7, 1886. From *Central Law Journal*.

constitution had been changed so as to adopt the language of the charter, "a sum not exceeding \$2,000, shall be paid to his family or as he may direct."

From the institution of the order, other sections of its constitution, had provided for a direction upon the records of the order, by each member as to the person to whom his benefit should be paid, and allowed him to change such direction from time to time, and also to change at any time from full rates to half rates, and vice versa, \$2,000 being the benefit to be paid on the death of a full-rate member, and \$1,000 on the death of a half-rate member.

John P. Gentry became a member of the order in 1877, and exercised the option which the laws of the order then allowed him, of applying for and receiving a certificate of membership, or benefit certificate, upon the margin of which he made the direction as to his beneficiaries.

In 1881, when he changed his beneficiary, the constitution and laws of the order, as they had been then amended, allowed members only the mode of designating their beneficiaries by directions on the margin of their benefit certificates, and allowed a change of beneficiaries only by surrendering the old certificate and applying for a new one, and paying a fee for the issuing of the latter.

The facts attending the change of his beneficiary by Gentry are stated in the opinion of the court.

J. E. WILLIAMSON, *for Plaintiffs.*

JAMES O. PIERCE, *for Defendant.*

WOODS, J.

The plaintiffs sue upon a benefit certificate issued by the Order of the Knights of Honor, in 1877, to John P. Gentry, in which it was stipulated that the sum of \$2,000 should, upon his death in good standing, be paid to "such person or persons as he might direct," and upon the margin of which certificate he directed that said sum should be paid to his wife and children, who are the present plaintiffs.

Defendants' answer sets up the charter of the defendant corporation, granted by the legislature of Kentucky, and the constitutions and by-laws adopted by the order, and shows that the privilege was reserved to Gentry, not only to nominate a beneficiary, but to revoke said nomination and change the beneficiary at pleasure; that previous to his death, in 1881, he exercised this privilege, surrendered the benefit certificate now sued on and applied for a new one, which

was issued to him, and in which he directed that his benefit be paid to Mrs. Minnie L. Jones, a creditor and not a relative, and that upon the death of said Gentry, the defendant paid the said sum of \$2,000 to said Mrs. Jones.

The demurrer filed by plaintiffs to this answer raised the question of the sufficiency of this defense.

Plaintiffs' counsel relies upon the grant of power in defendant's charter, to establish a widows and orphans' benefit fund, from which, in case of the death of a member who has complied with all its lawful requirements, "a sum not exceeding \$5,000 shall be paid to his family or as he may direct." It is insisted that this clause of the charter establishes the family of the member, who at his death may fall in the category of "widows and orphans," as a class to which the member is limited in designating his beneficiary.

The question has been several times decided by other courts, under this and similar charters or constitutions, and it has been held that the words "or as he may direct," or others of similar import, confer upon the member a general power of designating as beneficiary any person or persons whom he may choose. In the opinion of the court, this is the correct rule for the present case.

The defendant's charter was so construed in the following named cases, in which certificates of membership were involved, in terms substantially the same as the one now before the court: *Highland vs. Highland* (Ills.), 16 Chi. Leg. News, 272; *Tennessee Lodge vs. Ladd*, 5 Lea, 716; *Supreme Lodge vs. Martin*, 12 Ins. L. Jour. 628.

For cases in which the unlimited right to change the beneficiary has been conceded to the members of other mutual benefit societies, see *Dorian vs. Central Verein*, 7 Daly, 168; *Swift vs. Conductors' Asso.*, 96 Ills., 309; *Splawn vs. Chew*, 60 Texas, 532; *Hellenberg vs. I. O. B. B.*, 94 N. Y., 590; *Relief Asso. vs. McAuley*, 2 Mackey, 70.

It is urged that the courts of Kentucky, in which State the defendant was incorporated, have taken a different view of the question. It appears, however, that there is no real conflict of authority. The Kentucky cases in which it has been held that the member's power of appointment is limited to his family, or to some portion thereof, as a class, are cases in which such a limitation was found in the charter: *Masonic Ins. Co. vs. Miller*, 13 Bush., 489; *Weisert vs. Muehl*, 5 Ky. Law Rep., 285; *Hallan vs. Gardner*, 5 id., 857.

But the court of appeals of Kentucky, while so deciding, recognizes the principle, that in these mutual benefit societies, the member may have as broad a range of choice in selecting his beneficiary as the organic law of his society gives him: *Van Bibber vs. Van Bibber*, 14 Ins. L. Jour., 290; *Duvall vs. Goodson*, 79 Ky., 224.

It results that the appointment of the plaintiffs as beneficiaries under the original certificate issued to Gentry was subject to revocation by him, and that the appointment of a new beneficiary and the payment of the fund to her did not violate any right of the plaintiffs.

The plaintiffs electing to offer no reply to the defendant's answer, defendant is entitled to a judgment in its favor on the answer.

## SUPREME COURT OF ILLINOIS.

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*Appeal from the Appellate Court for the First District.*

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DANIEL R. BRANT.

vs.

BENJAMIN E. GALLUP ET AL.\*

Where suit is for a breach of contract for failure to keep insured property to the value of \$125,000, it comes within the Illinois statute, allowing appeals where over \$1,000 is involved.

Testimony of the writer as to his motives in writing certain letters regarding a claim put in evidence, is inadmissible.

Instructions as to the construction of a mortgage-clause in a mortgage, with relation to keeping the property insured, and its being of no effect in such a suit as the above, were irrelevant, but if they worked no harm, will not call for a reversal.

Where parties who have agreed with the owner, to keep the property insured, fail to do so, the owner cannot with knowledge of the failure, stand idly by and then, for the first time, after a loss, claim indemnity for a breach of contract; he should have procured such insurance for himself.

If in the face of such an agreement, the owner during two consecutive years, assumed the duty of procuring insurance for himself, he thereby released the parties who had agreed to procure it, from further obligations to do so.

Failure to comply with such agreement is barred by statute of limitations after five years, although the contract be a continuing one.

This was an action on the case, brought on the 6th day of October 1876, by Daniel R. Brant, against Benjamin E. Gallup and Francis B. Peabody. The declaration substantially avers that Gallup & Peabody were loan agents, and on April 1, 1869, negotiated a loan from one Bourne, to Brant, of \$45,000, payable in five years, and for security to Bourne took Brant's mortgage on certain property and the Dearborn Theater, in Chicago; that Brant, in consideration of

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\* Opinion filed at Ottawa, January 22, 1885.

taking the loan and executing the mortgage, and \$2,500 commissions paid Gallup & Peabody, employed them, and they agreed with him, to procure to be insured, and to keep insured during the life of the mortgage, the said theater building against loss or damage by fire, in good and responsible insurance companies, to the amount of its fair insurable value,—the plaintiff, on notification and request, to pay the premiums; that the fair insurable value of the theater was \$150,000; that the defendants failed and neglected to perform their duties in the above-named respects, and that during the life of the mortgage, and on October 9, 1871, the Dearborn Theater was destroyed by fire, and by reason of the premises the plaintiff lost the fair insurable value of the building.

There were three trials in the case, the first resulting in a verdict for plaintiff for \$73,666.66, the second and third in verdicts for the defendants. The judgment on the last verdict was on error, affirmed by the appellate court for the first district, and the plaintiff appealed to this court. A motion was made to dismiss the appeal for want of jurisdiction of this court to hear the appeal.

J. LYLE KING, *for Appellant*.

MESSRS. PADDOCK & ALDIS, and EMORY A. STORES, *for Appellees*.

WALKER, J.

This case is now before us on rehearing. We have reviewed the record and the grounds of our former decision with much care and patience, and given the questions the fullest and best consideration that the time at our disposal enabled us to bestow. We have labored under the disadvantage of having a large record loaded with immaterial matter, and no clear and compact statement of the facts given; but we have endeavored to fully comprehend the case and all the questions involved. With voluminous records, containing more irrelevant than pertinent matter, we find it of great difficulty to perform the task of gleaning the pertinent from the improper evidence in such cases. In cases thus prepared, it cannot be otherwise than mistakes will occur. Nor do voluminous and discursive arguments in all cases relieve us from the difficulty and labor in fully comprehending the case.

Before discussing the merits of the case, we will dispose of the preliminary motion to dismiss the appeal. The statute provides for an appeal from judgments of the appellate courts in all cases (*ex contractu*) where the "sum or value in controversy" exceeds \$1,000, ex-

clusive of costs. It appears from the transcript of the record, that on the application for this appeal, a motion was made to the appellate court by appellant, for a certificate of the court finding the sum or amount involved in the controversy. In support of the motion, appellant filed his affidavit, in which he stated that the claim was for the value of the property lost by reason of appellees' breach of agreement to insure it, to the extent of \$125,000. This affidavit appears in the record, and we may look to it as showing the amount in controversy, and as evidence that the claim litigated exceeds \$1,000, exclusive of costs. *Morris vs. Preston*, 93 Ill., 215.

There is also evidence in the record that the theater building was worth more than \$125,000 at the time it was burned, and to make that its fair insurable value. The suit was on a contract to keep the property insured at that insurable value, and damages were claimed for a breach of the contract. We think this brings the case within the fair intendment of the statute allowing appeals from the appellate court, and the motion is overruled.

On the trial a large number of letters were read in evidence, written by appellant to Bourne, after the fire, in reference to the loss, insurance on the property, and other matters connected with the transaction. In rebuttal, appellant offered, in a general way, to testify to the motives which induced him to write the letters in the manner he did, but the evidence was rejected, the court holding he might testify to the circumstances under which they were written, but not to his intentions or purpose in writing them as he did. This is assigned for error. Appellant might, no doubt, as the court below decided he could, have shown the circumstances under which the letters were written, but he had no right to change the fair and reasonable import of the letters by proving a secret and unexpressed intention when he propounded his claim in his letters. That would amount to a change of the letters, by adding to their meaning, as completely as to change them by adding to their contents by any other kind of extrinsic evidence. He might as well insist that he intended, but accidentally omitted, to add another paragraph to any of the letters asserting this claim. No one will contend that could be done, yet the same thing is sought to be accomplished by this indirect mode. There was therefore no error in rejecting this evidence.

In the beginning of this investigation it might be conceded that some of the instructions are irrelevant and others are not precisely accurate; but this being conceded, the question still remains, did



they mislead the jury to the injury of appellant? This is the real question presented in considering them.

The mortgage to Bourne contained the ordinary insurance clause in such mortgages, that the mortgagor should keep the property insured in good companies which the mortgagee might select, and in default thereof the latter should have the option of selecting and insuring at the mortgagor's expense, and the cost to be added as a part of the debt.

Complaint is made of the first of appellees' instructions. After giving a construction to the insurance clause in the mortgage, it concludes with this proposition:—

“That any unwritten agreement made at the time of the execution of the mortgage, or immediately preceding its execution, between Brant and Bourne, or Brant and Gallup & Peabody, as Bourne's agents, that Bourne would himself keep the property insured, and was to have the exclusive privilege of insuring the property, and was to relieve Brant from any such duty, was inconsistent with the clause in the written instrument referred to in the instruction, and would have been unavailable as a defense to any suit brought for a foreclosure of the mortgage, and no benefits could have accrued to Brant from any such pretended agreement.”

It is urged that the instruction is irrelevant, and it should not therefore have been given,—that the construction of that clause of the mortgage was wholly foreign to every issue in this case, and it should not have been given. We fully concur in this position, except the last clause in the instruction. The mortgage, its construction, or even its validity, had no bearing on this case or its issues; but it being a mere abstract proposition we are at a loss to perceive how it could have misled the jury. But the last clause was pertinent. Appellant, in his declaration set out as inducement, the making of the mortgage with the insurance clause, to the making of the contract averred in the declaration. It is a rule that such an inducement must be proved as averred. It was therefore proper and necessary that having averred the inducement, appellant should have proved it. He did so and went further, and testified that Peabody assured him that the insurance clause required Bourne, or Gallup & Peabody, to effect the insurance for him. This did not constitute a contract between appellees and appellant, nor does appellant insist that it did. He sues on an entirely differ-

ent and distinct contract, and it was proper that the jury should be so informed. The last clause of the instruction virtually informed the jury that such statements did not create a contract or confer any benefit on appellant. He had averred a different agreement, and could recover on none other, much less on the inducement to the agreement averred in the declaration. Whether or not it conferred any benefit or created a defense to the foreclosure of the mortgage, does not matter,—it created no right to recover in this action. And it was not error to inform the jury that such an agreement was inconsistent with the insurance clause, and constituted no defense to a foreclosure of the mortgage. This part of the instruction was simply irrelevant. We are of opinion that the giving of this instruction worked appellant no harm.

In this case appellees asked, and the court gave, twenty-five instructions. Some of them are lengthy, others are in whole or in part repetitions, some are irrelevant, and many of them are obscure. In such cases it would be proper for the judge trying the cause to reconstruct the free instructions from redundancy, verbiage, and all foreign matter, and reduce them to a few clear and perspicuous legal propositions upon which the case turns, and give them as substitutes for those asked. The ends of justice would be thus better subserved, and there would be less complaints of the finding of verdicts.

The same objection is urged to the second, third, fourth, sixth, eighth, and ninth of appellees' instructions as is urged to the first, and what has been said of the first is equally applicable to them. Correct practice would require the trial court to refuse all but one of instructions that repeat the same proposition. The proposition will not be controverted that the mere expression of opinion by Peabody as to the meaning of the insurance clause in the mortgage could not operate to render him and Gallup liable. That could be done only by an agreement entered into between the parties, and understood and intended by them to become binding according to its terms. It was to guard against what was supposed to be the danger of the jury finding that such an opinion constituted a contract, that these instructions were asked and given. Appellant had testified that Peabody had, when the mortgage was executed, said the insurance clause bound Bourne, or Gallup & Peabody, as his agents, to keep the houses insured, and as that statement had been admitted in evidence, it was to obviate any wrong that might result from its admission that they were given.

The sixth of appellees' instructions is criticised. Another portion to which objection is urged, reads:—

"An agreement made between the defendants and Brant, that the defendants would, as Brant's agents, keep said premises fully insured, is inconsistent with an agreement by which the defendants engaged, as the agents of Bourne, to see to it that the buildings described in the mortgage were kept fully insured. An agreement such as is alleged in the declaration and in each count thereof, is consistent with the clause in the mortgage relating to insurance, because by such agreement Brant was employing his agents to do what he had agreed by mortgage to do; but any agreement made by Gallup & Peabody, as the agents of Bourne, that they would, as such agents, keep said property fully insured, and would relieve and absolve Brant from all responsibility therefor, would be inconsistent with the mortgage, because the clause referred to provided and provides that Brant, and not Bourne, should keep said property insured. But the court does not mean to intimate by what is here said, that because said agreement would be inconsistent with the mortgage, it could not have been made. Whether or not it or the agreement alleged in the declaration was made, the jury must determine from all the facts and circumstances in evidence."

It is urged that such a contract as is set out in the declaration is not inconsistent with the insurance clause. This is manifestly true; but the instruction does not say the contract set up in the declaration is inconsistent with the insurance clause. It states the opposite fact. It does, however, say that an agreement that Bourne, or appellees, as his agents, would perform the duty imposed on appellant, would be inconsistent with that clause. This is true, because appellant had covenanted that he would perform that duty, and such a verbal agreement or understanding could not change or abrogate his covenant. But this is irrelevant to the issues involved. The instruction did state that the parties could make the contract set out in the declaration.

It is urged that such a contract as that mentioned in the instruction, would not have been inconsistent with the insurance clause, because both parties had insurable interests. Whether this is true or not, does not matter, because that question was not pertinent to the issues in the case.

The seventh instruction is criticised. It simply informs the jury

that the evidence in the case must establish the contract declared on, and failing to do so, they should find for the defendants. Although not concisely stated, this the jury would no doubt understand to be its import. It announced a correct rule of law, and was properly given, and we think it could not have misled the jury.

It is claimed that the tenth instruction is vicious, and it was error to give it. It in substance informed the jury that if they believed, from the evidence, that appellant had been informed a sufficient time before the fire that the theater was inadequately insured, then it was his duty to have effected additional insurance, if he deemed it necessary, and failing to do so, he could not recover. This involves the question whether, in case of a breach of a contract for indemnity, the person indemnified, knowing of the breach of the agreement, may lie by and permit the loss to occur without a demand of performance of the agreement, or to take other steps to secure himself from the loss, by performing the acts undertaken to be performed by the other party, or to procure other indemnity. The substance of this instruction is, that the party indemnified shall take such steps. It has been repeatedly held that a party being damaged, cannot stand by and suffer the injury to continue and increase, without reasonable effort to prevent further loss. Justice and the principles of fairness require that every one shall use all reasonable efforts to preserve his property and protect his interests, even against the wrong or negligence of another. It is said it is not only the moral but the legal duty of a party who seeks to recover for another's wrong, to use due diligence in preventing loss thereby. This principle applies to a breach of contract, and a party is not entitled to compensation for injurious consequences from such breach, so far as he had the information, time, and opportunity to prevent them. See *Sedgwick on Damages*, 6th ed., p. 106, both text and note, and authorities cited. The same principle has been recognized by this court in cases of trespass. If the doctrine is correct (and we perceive no reason, on principle or authority, to doubt it), then it was the duty of appellant to have procured insurance. Gallup & Peabody, so far as it disclosed by the record, never, after the mortgage was executed, procured a dollar of insurance on the buildings. It is, however, claimed that they directed the insurance agents to issue policies, and when called on by the agents, appellant paid the premiums. If this is true, appellant was fully informed of the extent they had ordered insurance for him, and as he made no objection to the amount, he must have been satisfied. Had he not been, he

surely would have seen them, and ordered more, and as he did not, he accepted what they did as a performance of their part of the contract. Knowing the amount they had ordered, if not satisfactory and the contract was broken by a failure to order more, it was the duty of appellant to procure such an amount as he regarded necessary, and failing to do so, under the authorities referred to he could not recover. This instruction, therefore, was not erroneous, and no error was committed in giving it.

It is urged that the thirteenth instruction is erroneous. It in substance informs the jury that if appellees neglected to insure the property, even if they had so agreed, for the years 1870 and 1871, and that appellant assumed the duty and responsibility, that would terminate the agreement, and would operate to release them from their contract, if one existed, to procure insurance after 1870; and in such a case there would be no recovery for any breach accruing after 1870, and that all prior breaches were barred by the statute of limitation. If there was such a contract, as claimed, and appellees neglected to perform it, and appellant assumed the duty during those years, he certainly absolved appellees from the contract and waived its performance. All breaches prior to that time occurred more than five years before the suit was brought.

But it is said that this was a continuing agreement, and it did not terminate until the theater was burned. If there was a contract, and there was a breach before 1870, an action could have been brought, and nominal damages could have been recovered, and no more, because there was not the slightest injury sustained by such a breach. The action was barred after five years, and if after that time appellant procured all the insurance he desired, that absolved appellees from further duty under the agreement, if one existed.

There were some instructions relating to the impeachment of witnesses by contradictory statements, and in regard to the statute of limitation; but we do not perceive there was any material error in giving them.

The whole of appellees' instructions considered, if they are not precisely accurate, are so slightly incorrect that we are of opinion they did not mislead the jury. It would be impossible in so large a record, containing so much irrelevant matter, to avoid some slight errors or to give some instructions subject to hypercritical objections; but such objections, if allowed, only obstruct the administration of justice.

Complaint is made that the court erred in refusing to give the

third of appellants' instructions. From what has been said it will be perceived this instruction should not have been given without qualification. It made no reference to the statute of limitations, or the abandonment of the contract by tacit consent. There was no error in its refusal.

The judgment of the appellate court is confirmed.

Judgment affirmed.

SHELDON and MULKEY, J. J., dissenting.

## SUPREME COURT OF OHIO.

STATE, EX REL. LAWRENCE, ATT'Y-GEN.,

US.

PEOPLE'S MUTUAL BENEFIT ASS'N.\*

Associations organized under the provisions of the law embodied in the Revised Statutes, section 3,630, "for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of deceased members," are not authorized to issue certificates of membership payable to the named beneficiary "or assigns," nor payable in case of death to others than the family or heirs of the insured member. Trustees of such associations having voted to themselves and accepted designated sums of money, as compensation for their services for particular years, have no power, in subsequent years of their service, to vote themselves "back pay" for their services during such former years. Such trustees have no authority, by virtue simply of their trusteeship, to act for or bind their association except in their aggregate and administrative capacity as a board; and where they assume, by virtue of their trusteeship, to act in the separate and individual capacity of treasurer, secretary, or as general or special agent of their association, they cannot thereby create against it a legal liability to compensate them as trustees for such services. Such trustees, unless especially invested with the additional capacity and authority of officers or agents, are limited in their claims to compensation to such sums as will reasonably compensate them for the time and expense incurred in going to, attending, and returning from, their official meetings, and for their services while in session. Whether a corporation which is shown, upon a quo warranto proceeding, to have misused or abused its franchises, should be ousted of its corporate franchises, is a question not capable of determination by any fixed rule or test, but rests in the sound discretion of the court, in the light of all the circumstances of the case before it.

The defendant is a corporation organized on the 17th day of April, 1877, under the provisions of the law since embodied in the Revised Statutes, section 3,630, for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families and heirs of deceased members.

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\* Decision rendered, Feb. 3, 1885.

The object of the present proceeding is to oust it from its franchises to do business as such corporation.

Of the grounds alleged against it, those considered in the opinion of the court are, (1) that it has issued certificates of membership for the payment of stipulated sums of money for the benefit of persons who are not members of the family or heirs of the assured; (2) that the certificates of membership issued by it are made payable to the beneficiary or assigns, and provide for the assignment of the same with the consent of the company, and that such certificates have been so assigned to persons not of the family or heirs of the assured; and (3) that it has been and was at the commencement of this proceeding, operated for the benefit of the trustees; that the sum of \$32,983.06 has been paid to its trustees under the pretense of remunerating them for attending the meetings of the board, whereas only forty-eight meetings have been held since its organization, making the average amount paid to each trustee for each attendance, \$77.24.

The defendant admits that it issued some certificates payable to persons who were not of the family or heirs of the assured; avers that their issue was in good faith; but that upon learning of a decision of this court that such certificates were unauthorized, to wit, in August, 1882, their issue was discontinued.

The defendant also admits the issuing of its certificates payable to the beneficiary or assigns, and their assignment as alleged, but avers that such form of certificate was approved by its legal adviser, and also presented to a former superintendent of insurance and attorney-general, and that the trustees understood them to give the opinion that the issuing of such form of certificates would be legal. That no objections had been made to such form until that of the present superintendent of insurance in August last. All bad faith is disclaimed, and the legality of such form is submitted to the court here for determination, with the assurance that if it be adjudged illegal, no such certificate will be issued thereafter.

The defendant denies that it has been operated for the profit of its trustees. Admitting that the sum of \$33,700 has been paid to the trustees, it avers that only a small part of the amount so paid to them was for attendance at the sessions of the board; that its success—issuing over 6,800 certificates, aggregating about \$10,000,000, and paying all its matured claims promptly and in full, aggregating \$258,117.41—has been accomplished by the labors of its trustees. That the trustees have, from the beginning, “spoken,



written, and labored to build up the association, and all of them have shared in the responsibility and the work." That the compensation paid the trustees was reasonable.

The reply denies the new matter in the answer.

The cause was heard by the court on the evidence.

The management of the association was intrusted to eleven trustees, a "prudential committee" of three trustees, a president, vice-president, secretary, treasurer, and general and special agents.

JAMES LAWRENCE, Attorney-General, *for Plaintiff.*

HARRISON, OLDS & MARSH, and C. N. OLDS, *for Defendant.*

OWEN, J.

1. It is admitted by the defendant that its certificates of membership were issued payable to the named beneficiary or "assigns," and that, with the consent of the company, certificates have been assigned to persons neither heirs nor of the family of the assured. May this lawfully be done? The purposes of the organization of the defendant are (1) the mutual protection and relief of its members, and (2) the payment of stipulated sums of money to the families or heirs of the deceased members.

It seems clear that the beneficiary named in each certificate must be an heir, or of the family of the deceased member. If the named beneficiary may assign his interest in the certificate to a stranger, who may thereby become invested with all the rights of his assignor, that may be effected by indirection, which is not permitted by direct means, and might result in the creation of a class of beneficiaries neither contemplated nor authorized by the defendant's charter. We are not now discussing the right of a beneficiary to assign his death-claim, matured by the death of the insured member, or other matured claim, but the right of a named beneficiary, during the life of the insured member, to endow those who are neither of the family, nor can become heirs of the insured, with all the rights of the beneficiary. Such form of certificate is unauthorized.

2. The matters pleaded as defense to the charge of issuing certificates of membership, payable in case of death to others than the families or heirs of the insured members, are substantially established by the proof. That they were unauthorized is conceded. It is admitted that \$33,700 have been paid to the

trustees as such, as compensation for their services since the organization of the defendant.

The evidence shows that a large proportion of the money voted by the trustees to themselves, was paid to them upon the pretended warrant of resolutions authorizing "back pay" for services claimed to have been rendered during years prior to those in which the resolutions were passed.

The new members of the association had a right to assume that the sums appropriated and paid by and to the trustees, as for their services in former years, were in full compensation therefor, and this scheme of voting back pay to themselves by the trustees cannot be justified by the most liberal construction of the statutes under which the defendant was chartered.

The sums so paid to the trustees were largely in excess of a fair and reasonable compensation for services actually rendered by them as such trustees. The trustees holding other offices of the company, including members of the prudential committee, were liberally salaried and paid for their services in their respective official capacities.

These allowances and payments to the trustees are sought to be justified on the ground that, in addition to the ordinary duties peculiar to their trusteeship, they rendered services in the interest of the company which were peculiar to the duties of secretary, treasurer, and general and special agents. Those trustees who were constituted agents of the association were, as such, liberally salaried and paid.

The duties peculiar to trusteeship are to be performed in an aggregate and administrative capacity. Their trusteeship does not equip them for the promiscuous and indiscriminate services for which they now claim to have been entitled to compensation. Their trusteeship does not constitute them "agents," either general or special. As trustees, they have no power, acting in a separate and individual capacity, to bind the company.

As trustees they can bind the company only by their action in their aggregate capacity as a board.

For the time and expense incurred in going to, attending, and returning from, their official meetings, and for their services at such meetings, they are entitled to reasonable compensation.

The assumption, however, that the trustees voted these sums to themselves simply as compensation for services actually rendered, is

shown to be unwarranted by the fact that they were allowed without regard to the respective character, extent, or value of such services.

While the services for which they now claim right to be compensated were widely unequal in extent and value, exact uniformity was observed in the amount paid them.

In fact, these payments seems to have been regulated rather by the condition of the treasury than by the compensation actually earned.

To be plain about it, this system of paying so-called compensation is but a poorly disguised scheme for a "division of profits" among the trustees.

Our inevitable conclusion from all this is that the charge preferred against the defendant, that it has been "operated for the profit of its trustees," is sustained.

In view of the admissions of the defendant and the foregoing findings of the court concerning the exercise and abuse of its franchises, ought the prayer of the relator to be granted and the defendant ousted of its franchise to do business as a corporation? This question involves the discharge of an exceedingly delicate and responsible duty, and is one upon which we are not all agreed. It is conceded that the determination of this question rests with the sound discretion of this court, in the light of all the circumstances of the case.

Many things may be said to the credit of this defendant—the methods of its management—the care and fidelity of its principal officers and agents in the selection of risks—the promptness and fairness of the adjustment and payment of death-claims—the class and character of those who chiefly constitute its membership. But it would be as injudicious as it is impracticable to attempt to fix a rule or establish a test by which the life of such a corporation, whose franchises have been abused, is either to be taken or spared.

The present membership of the defendant numbers about 3,500, chiefly worthy and deserving people, utterly innocent if not wholly ignorant of any misuse or abuse of its franchises. Purged of the unfortunate feature of its management which this trial has developed, this association is capable of much usefulness. To visit the perversion of its objects by a few upon the heads of the entire membership, must result in irremediable hardship; and without stating more fully the grounds of our action, or the considerations which moves us, it must serve our present purpose to say that

the relator's prayer that the defendant be ousted of its franchise to be a corporation is refused.

Judgment will be entered, however, ousting it of the use of its franchises for the profit of its trustees, and for the issuing of certificates of membership in the form complained of by relator.

Judgment accordingly.

OKEY, J., took no part in the decision of this case.

FOLLETT, J., dissents from the refusal of the prayer for ouster of the defendant of its corporate franchises.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas No. 2, of Allegheny County.*

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PITTSBURGH INS. CO.)

vs.

JONAS FRAZEE.\* )

It is not error to leave to the jury the question of partnership *inter se*, the evidence tending to show a purchase of a stock of goods in a store by one, and his employment of another, who had no interest in it, to conduct the business for half the net profits, being responsible for half the losses by bad debts.

A policy on a stock of goods "usually kept in a country store," with printed condition to be void if gunpowder be kept in the building, and printed permission to merchants accustomed to deal in it to keep it for sale in a limited quantity, is avoided by keeping it in excess of such quantity, notwithstanding a usage to keep it in such stores in greater quantities.

The action was covenant by Frazee on a policy of insurance against fire, "on his stock of dry-goods, groceries and merchandise usually kept in a country store, contained in the frame building occupied as store and dwelling, situate detached in the village of Shellysport, Garrett County, Maryland."

The policy contained, under the caption "Conditions of Insurance," printed conspicuously on its face in large, plain capitals, the following conditions, among others, viz. :—

"III. Prohibitions and conditions under which this policy becomes null and void. Except as otherwise permitted and expressed in the printed conditions of this policy, gunpowder, \* \* \* are positively prohibited from being deposited, stored, kept, or used in any building insured upon, or containing any property insured on

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\* Opinion filed, Jan. 19, 1885. From *Pittsburgh Legal Journal*.

by this policy, unless by special consent in writing indorsed hereon, naming each article specifically—otherwise the insurance by this policy shall be void.”

“IV. Privilege as to lights, keeping and vending of coal-oil, gunpowder, etc. \* \* \* Merchants accustomed to deal in the articles are privileged to keep for sale twenty-five pounds of gunpowder in close tin can, to be sold by daylight only.”

“V. General provisions. \* \* \* It is understood and agreed that this policy is void unless the assured be and shall remain the sole, undisputed, and exclusive owner of the legal title to the subject of insurance mentioned in this policy, and that the same is free and shall remain free from all incumbrances, except it be otherwise provided in writing in this policy.”

The company defended on the grounds, (1) that the plaintiff was not, and did not continue the sole and exclusive owner, etc., and (2) that he kept and had stored in the building in which the goods were, more than twenty-five pounds of gunpowder.

The evidence on part of the plaintiff tended to show that the store was bought and the business thereof carried on, under an agreement between his brother Jasper and himself, that he should furnish the capital required, and Jasper should keep the store and manage the business, and receive half the profits and bear half the losses by bad debts; each to be charged with the goods received by him from the store. It was claimed for the company, and the jury was instructed, that if this was the case, the plaintiff was not the sole and exclusive owner within the meaning of the policy. But the jury was further instructed substantially that if the plaintiff furnished and kept up the stock with his own money, and Jasper had no interest in the stock, but for his services, instead of a salary, was to receive half the net profits and be responsible for half the bad debts, then the goods were the sole property of the plaintiff; which instruction was assigned for error, it being claimed there was no evidence to justify a finding that the plaintiff kept up the stock with his own money, or that Jasper had no interest in the stock.

For the company it was shown that at the time of the fire there were kept in the store more than twenty-five pounds of gunpowder. To justify this the plaintiff was permitted to show a usage to keep gunpowder in country stores in the quantities shown, and this was assigned for error.

The jury was instructed substantially that, if it was the custom to keep in country stores more than twenty-five pounds of gunpowder

and the defendant knew it at the time the policy was executed, the keeping of more would not prevent recovery, and that knowledge of such custom on part of the company's officers might be presumed, especially as the keeping of gunpowder was not specified as an objection when the proof of loss was delivered; both of which instructions were assigned for error.

Messrs. JOHN A. WILSON and JOHN G. BRYANT, *for Plaintiff in Error*.  
J. W. THOMAS, Esq., of Maryland, and J. M. STONER, Esq., *Contra*.

CLARK, J.

The policy of insurance upon which this suit was brought is dated, August 13, 1881, it provided indemnity to Jonas Frazee against loss by fire for one year, upon "his stock of dry-goods, groceries, and merchandise, usually kept in a country store, contained in the frame building, occupied as store and dwelling, situate detached in the village of Selbysport, Garrett County, Maryland."

By one of the general provisions of the policy it was agreed that it should be void, "unless the assured be and shall remain the sole, undisputed, and exclusive owner of the legal title to the subject of insurance mentioned in the policy." Jonas Frazee in substance testified that he owned the stock of goods himself, that he purchased it from his brother, Charles F. Frazee, and paid for it with his own money; that his brother Jasper had no interest whatever in it, but was employed merely to conduct the business, receiving for his services one-half of the profits realized, less one-half of the losses from bad debts. In this he was corroborated by his brother Jasper, who stated that he never had, nor claimed to have, any interest in the stock and that he was simply an agent or employe of his brother, the plaintiff, who was the absolute owner.

There was, it is true, much countervailing proof on this point; the books were opened in the name of J. Frazee & Bro., the sign set up in front of their place of business was in the same form, and the first proofs of loss clearly stated a joint ownership of the goods. These apparently inconsistent facts were to some extent explained, however, and the question as to the real ownership of the stock was plainly one for the jury; there was, without doubt, abundant evidence to justify the submission.

The court instructed the jury that "if the plaintiff furnished the original stock of goods, and kept it up with his own money, and his brother Jasper had no interest in it, but for his services in keeping

the store, instead of a salary, was to receive one-half of the net profits, and be responsible for one-half of the bad debts, then the goods would be the sole property of Jonas Frazee." In this, we think, the court was clearly correct. No question as to any partnership relation or liability which by construction of law might be supposed to exist, as to third persons or creditors is here presented; the inquiry is as to the ownership of the stock as between the parties themselves, and in such case where there is a positive agreement that must govern. If the evidence of Jonas and Jasper Frazee is believed, there was such an agreement, and Jonas Frazee, as against Jasper at least, was certainly the sole, undisputed, and exclusive owner of the goods. The first and sixth assignments are therefore not sustained.

The remaining assignments, however, relating to the ruling of the court as to the plaintiff's right, under the policy, to store gunpowder in the building containing the insured property, in excess of the amount specified in the policy, possess more merit. In *Franklin Fire Insurance Co. vs. Updegraff*, 7 Wright, 357, the insurance was upon "merchandise such as is usually kept in country stores;" the stock, at the time of the fire, consisted in part of hardware, china, and glassware. By the terms of the policy merchandise of this character was classed as "hazardous," and subjected the insured to the payment of higher rates; by the twelfth condition the omission to specify such property voided the policy; it was held, however, in a suit to recover the loss, that the insurance was not void, because hardware, china, and glassware were not specifically mentioned, if the articles were such as were usually kept in a country store. The expression "merchandise such as is usually kept in country stores," was deemed a sufficient designation of the articles insured, and to include "hardware, china, and glassware," if these articles were usually so kept. The company accepting such a general description of the stock insured was bound to know what was usually kept in a country store, and the finding of the jury was conclusive on that question.

In *Citizens Insurance Co. vs. McLaughlin*, 3 P. F. Smith, 485, the insurance was upon "a tannery and patent-leather manufactory;" the policy provided that benzole to the amount of five barrels might be kept in a shed detached from the buildings, over one hundred feet distant, and nowhere else on the premises; it was stored in the shed as stipulated, but was carried in cans into the buildings insured as needed and used in the process of japanning leather. It ap-



peared, however, that benzole was ordinarily used in the manufacture of patent leather, and that this was the purpose in providing for its storage ; therefore, it was held that the presumption was that it was intended by the contracting parties that benzole might be used in the factory, as it was ordinarily used in similar factories ; that the policy included whatever was necessary and essential in conducting the business, if not expressly excepted.

Under the doctrine declared in *Franklin Insurance Co. vs. Updegraff* the insurers were bound to know, if the fact were so, that gunpowder was a commodity usually kept in a country store, whether specifically set out in the policy or not. The right to keep and sell that article does not in this case, however, depend upon mere construction, it is not left to inference by special mention, within certain limits; the right is expressly conceded, and the case last referred to we think becomes unimportant. It is said, however, that as the insurance is upon such articles as are kept in a country store, the presumption is that the parties intended that gunpowder should be kept in the usual quantity, and the case of *Citizens Insurance Co. vs. McLaughlin* is relied upon as supporting this view. There is, however, a plain distinction between that case and the case under consideration. There was no restriction in that case as to the amount of benzole to be used in the factory in the manufacture of japanned leather, the presumption was that it was intended to be used as it was ordinarily used in similar factories ; but in this case the amount of gunpowder, which might be kept on hand in the store for the purposes of sale in the plaintiff's business, is expressly limited, and the limitation is written as a condition of the policy. No fraud is shown, no undue advantage alleged, no ambiguity or uncertainty exists in the contract, and we must, therefore, read the contract as it is plainly written. It is true that the restriction is contained in the printed portion of the policy, which is prepared in such a general form as to meet all cases presented ; that the written parts inserted must therefore be taken as being more immediately expressive of the intention of the parties, and if there be any repugnancy or conflict between them, the latter must have controlling effect ; that the language of the policy is the language of the company, and in case of doubt, an ambiguity must be taken most strongly against the company ; but we can discover no such repugnancy or conflict, the contract is clear and therefore conclusive. Nor can we regard the restriction as unreasonable, it applies only to the particular building containing the property insured, and it is a wise precaution when

practicable, not only upon the part of the insurer but the insured, that the storage of a highly dangerous and inflammable substance like gunpowder, should be in a place apart from and reasonably removed from the general store.

The court erred, we think, in receiving evidence of the general custom of merchants in country stores as to the quantity of gunpowder usually kept on hand, and in submitting to the jury the question whether the conduct of the insured was in compliance with that custom.

The judgment is therefore reversed and a venire facias de novo awarded.

## COURT OF APPEALS OF WEST VIRGINIA.

SOPHIA SCHWARZBACH ET AL., *Defendants in Error,*  
vs.  
OHIO VALLEY PROTECTIVE UNION, *Plaintiff in Error.\**

Evidence of issuing of policy and of refusal to pay claim without objecting to proofs, is admissible, although proofs of death are not produced, and it is not shown that an offer to deliver up policy on payment of claim according to its terms had been made.

Indorsements on proofs showing when they were delivered are proper evidence, though the proofs themselves are not read to the jury.

Declarations of insured as to previous sickness are hearsay and inadmissible.

Hypothetical questions to experts as to the effect of certain disorders are properly disallowed.

The materiality of warranties is not open to consideration, but in case of doubt the court will construe answers as representations.

Answers to specific questions which are fraudulent misrepresentations, will work a forfeiture. But answers which could only be made to the best of knowledge or belief will not work a forfeiture if made in good faith.

Answers filled in by the agent on his own responsibility will not be regarded as made by the insured.

The issuing of a policy or continued receipt of premiums after knowledge of facts which would work a forfeiture, will operate as a waiver.

Proofs of death when required as a prerequisite of payment must be shown to have been furnished in order to recover.

## ABSTRACT OF OPINION.

A court ought not to exclude all the plaintiff's evidence from the jury on the defendant's motion, unless regarding the defendant as though he was a demurrant to the plaintiffs' evidence, the court would find for the demurrant.

\* Decision rendered, April 4, 1885.

A suit is brought by the wife and children on a life policy issued on the life of a man for their benefit; they prove the issuing of the policy sued upon by the defendant, and that it was issued for the benefit of the plaintiffs; that the man insured died some six months before the bringing of the suit; that the proofs of his death required by the policy to be delivered 90 days before the policy should be payable, was delivered to the defendant more than 90 days before the suit was brought; that more than a month before the suit was brought, the defendant refused to pay this policy when called upon by the plaintiffs to do so, and did so without making any objection to the proofs of the death of the person whose life was insured, but the plaintiff did not produce the proofs of the death which had been delivered to the defendant, though they could have produced them and did not show that they had offered to deliver up the policy, on payment of the amount to the defendant, the policy requiring the payment to be made after proof of the death of the insured upon receipt and surrender of the policy. —**Held:**—

On motion by the defendant to exclude the plaintiffs' evidence, this being all of it, the court did not err in overruling the motion.

In such a suit, the defendant having, on demand of the plaintiff, produced the proof of the death of the insured, the court may properly allow the plaintiff to read to the jury the indorsements on the back of such proofs for the purpose of showing when they were received by the defendant without requiring the plaintiff to read to the jury the proofs of death.

If declarations in such case were made by the insured as to his having had, at some previous time, a severe attack of sickness, in contradiction of his statement in the application for the policy, whether these declarations were made before or after the issuing of the policy, being mere hearsay evidence they are inadmissible as evidence against the plaintiff.

Though the policy provides for the amount named being paid upon the receipt by the defendant of the policy, still if the defendant positively refused to pay the policy because unjust, the plaintiffs could sue upon it and recover without proving that they offered to surrender the policy on its payment.

A question asked of the examining physician and of a man engaged in the insurance business as experts as to what would be the character of the risk on a man's life if within 3 months he had had a hemorrhage of the stomach, was properly not allowed to be put or answered.

If the answers of the insured to the questions propounded to him on the application, which are made a part of the policy, are by the policy warranted to be true, this removes their materiality from the consideration of the jury, and if any of the answers are false in fact, the policy is thereby forfeited, though the answers were made in perfect good faith.

But in determining whether the answers by the insured in the application are warranties or representations, the court leans in favor of construing the policy as making them representations rather than warranties, and if a portion of the policy or application would indicate them to be warranties, but another portion of the application shows that they were to be regarded as representations, the answers to these questions will not be regarded as warranted to be true, though the policy be construed as not warranting the truth of the answers of the insured, etc.

If these answers to specific questions are misrepresentations, the policy will be avoided whether the court or jury regard the answers as material or not, for the parties, by putting and answering such questions, have declared that they regarded them as material.

But a false answer to a question in order to be such a misrepresentation as will forfeit a policy, must be fraudulently false—that is, in making the answer the insured must be guilty of actual fraud or legal fraud, and by actual fraud is meant an intention to deceive, but legal fraud may exist when there is no intention to deceive, as where the insured states in his answer that he knows personally that his answer is true when it really is not true, or where the answer contains a statement which from its nature the insurers must necessarily regard as made on the personal knowledge of the insured, which statement is false. In both these cases the insured is guilty of a legal fraud, which will forfeit the policy, though the false statement was made without any intent to deceive, but was the result of carelessness or forgetfulness.

But if the answer is such as must have been made, not on the personal knowledge of the insured but upon his best judgment and belief, as that he was of "sound body," and it be untrue, it will still not forfeit the policy if the answer was made in perfect good faith and the insured had no suspicion that he was unsound of body, though it be afterwards shown that he had then a fatal internal disease of which he afterwards died. Perfect good faith is all that is required in such a case.

If an agent of an insurance company fills up the answers of the in-

sured in a printed form of application furnished to the agent by the insurance company, and procures the insured to sign such application, and in this application the agent has filled up an answer to a question which he never propounded to the insured, and the insured, trusting to this agent, never read the application and did not know that it shows any such question to have been put or answered, though he may have had an opportunity of reading the application either before or after he signed it, yet if such answer to such question so inserted in the application without the knowledge of the insured be false, it cannot operate as a forfeiture of the policy, as the making of such answer under these circumstances will not be regarded as the answer of the insured but as the act of the insurance company by its agent.

If when an insurance company issues a policy it knows certain facts which are material to the risk taken, it cannot claim a forfeiture of the policy because of the existence of these facts, though the insured in his answer to the question may have stated that such facts did not exist.

If after the issuing of a policy certain facts become known to an insurance company, which under the terms of the policy it has issued would operate as a forfeiture of the policy, and the company, after it has acquired the knowledge of these facts, continues to receive premiums from the insured, or to levy assessments on him and to receive payment of these assessments from the insured, such conduct of the company will estop it from claiming that such facts so known to it operate as a forfeiture of the policy.

If a life policy contains a provision that the amount of the insurance shall be payable 90 days after the proof of the death of the insured is delivered to the company, and a suit is brought on such policy under chapter 66 of the acts of 1877, or under chapter 71, acts 1882, section 61st, seq., and the defendant fails in his statement of defenses to state that he relies on the failure of the plaintiffs to furnish these proofs of death of the insured to the defendant before suit brought, still the plaintiffs cannot recover without proving that they furnished those proofs of the death of the insured as required by the policy, for this constitutes a part of the plaintiffs' case, and without this proof they do not make out a *prima facie* case, and it does not constitute a matter of defense, and therefore must not be stated in the statement of the defenses filed by the defendant.

## COURT OF APPEALS OF NEW YORK.

ROBERT R. WESTOVER, AS EXECUTOR ETC. OF HIRAM  
GORE, DECEASED, *Respondent*,

vs.

ÆTNA LIFE INS. CO., *Appellant*.\*

The New York statute making information acquired by the physician in his professional capacity privileged and prohibiting its disclosure unless expressly waived by the patient, is founded on public policy, and its provisions cannot be waived except as expressly provided. The prohibition remains in force after the death of the patient as well as during his life, and an executor or administrator is not a personal representative of the patient in such a sense as to authorize him to waive it. He represents simply in respect to rights of property.

ROLLIN TRACY, *for Appellant*.

S. E. PAYNE, *for Respondent*.

EARL, J.

This action was commenced upon a life insurance policy issued to the plaintiff's testator. It was provided in the policy that it should be void if the insured should commit suicide or die by his own hand. He hanged himself, and upon that ground the action was mainly defended. The plaintiff gave evidence tending to show that the testator hanged himself while insane, and the question was submitted to the jury for their determination whether the hanging was the voluntary, conscious, willing act of the testator, or whether he was at the time so insane that he was either unconscious of the act which he performed, or was unable to understand what the physical consequences of it would be ; and upon that question the jury found for the plaintiff.

\* Decision rendered, April 14, 1886.

In the course of the trial the plaintiff called a physician who had known the insured for a long time, and who attended him professionally a short time before his death. He testified that he visited him first in June, 1881, and he was asked this question: "State how you found him?" The counsel for the defendant objected to the question on the ground that "the evidence was incompetent and privileged under section 834 of the Code of Civil Procedure, viz.: the witness being a practicing physician and the evidence being a disclosure of information acquired by him in attending Gore in a professional capacity and necessary to enable him to act in that capacity, and the witness should not be allowed to testify and disclose the information so acquired." The court overruled the objection, and the witness answered at length, giving important evidence as to the mental and physical condition at that time and subsequently of the insured. The claim of the learned counsel for the respondent on the argument before us was that the plaintiff, as the personal representative of the deceased, could waive the seal which the statute puts upon such evidence, and upon that ground the ruling of the trial judge was sustained by the general term.

Section 833 of the Code provides that "a clergyman or other minister of any religion shall not be allowed to disclose a confession made to him in his professional character, in the course of discipline enjoined by the rules or practice of the religious body to which he belongs." Section 834 provides, "that a person duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity." Section 835 provides that "an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him or his advice given thereon in the course of his professional employment," and section 836 provides that "the last three sections apply to every examination of a person as a witness unless the provisions thereof are expressly waived by the person confessing, the patient, or client." It is thus seen that clergymen, physicians, and attorneys are not only absolutely prohibited from making the disclosures mentioned, but that by an entirely new section it is provided that the seal of the law placed upon such disclosures can be removed only by the express waiver of the persons mentioned. Thus there does not seem to be left any room for construction. The sections are absolute and unqualified. These provisions of law are founded upon public policy, and in all cases where they apply, the



seal of the law must forever remain until it is removed by the person confessing, or the patient, or the client: *Edington vs. Mutual Life Ins. Co.*, 67 N. Y., 185; *Edington vs. Aetna L. Ins. Co.*, 77 N. Y., 564; *Pierson vs. The People*, 79 N. Y., 424; *Gratton vs. Metropolitan L. Ins. Co.*, 80 N. Y., 281. In *Greenleaf on Evidence*, sec. 243, speaking of communications made to an attorney, the learned author says: "The protection given by the law to such communications does not cease with the termination of the suit, or other litigation or business in which they were made; nor is it affected by the party ceasing to employ the attorney and retaining another; nor by any other change of relations between them; nor by the death of the client. The seal of the law once fixed upon them remains forever, unless removed by the party himself in whose favor it was there placed. It is not removed without the client's consent, even though the interests of criminal justice may seem to require the production of the evidence." In *Wharton on Evidence*, section 584, it is said that the privilege of the client may be waived by him, but that "the evidence of the waiver must be distinct and unequivocal." In *Pierson vs. The People*, it was said: "The plain purpose of this statute was to enable a patient to make known his condition to his physician without the danger of any disclosure by him which would annoy the feelings, damage the character, or impair the standing of the patient while living, or disgrace his memory when dead." In *Grattan vs. Metropolitan Life Ins. Co.*, *Danforth, J.*, said: "The case before us is not where the witness was called in for the first time after the death of the patient, but one where the lips of the physician were sealed during the life of the patient, and where, although by death he loses the patient, his lips must remain closed. It was held under the old law that the seal must remain until removed by the patient, and it is now so provided by statute."

The purpose of the law would be thwarted, and the policy intended to be promoted thereby would be defeated if death removed the seal of secrecy from the communications and disclosures which a patient should make to his physician, or a client to his attorney, or a penitent to his priest. Whenever the evidence comes within the purview of the statutes, it is absolutely prohibited, and may be objected to by any one unless it be waived by the person for whose benefit and protection the statutes were enacted. After one has gone to his grave the living are not permitted to impair his fame and disgrace his memory by dragging to the light communications and disclosures made under the seal of the statutes. An executor or

administrator does not represent the deceased for the purpose of making such a waiver. He represents him simply in reference to rights of property and not in reference to those rights which pertain to the person and character of the testator. If one representing the property of a patient can waive the seal of the statute because he represents the property, then the right to make the waiver would exist as well before death as after, and a general assignee of a patient for the purpose of protecting the assigned estate could make the waiver ; and yet it has been held that an assignee in bankruptcy is not empowered to consent that the professional communications of his assignor shall be disclosed : *Bowman vs. Norton*, 5 C. & P., 177. In *Edington vs. Mutual Life Ins. Co.* (67 N. Y., 185), it was not decided nor stated that a personal representative could waive the protection of the statutes, but it was held that the personal representative or assignee of the patient could make the objection to evidence forbidden by the statute; and the opinion might have gone further and held that any party to an action could make the objection, as the evidence in itself is objectionable unless the objection be waived by the person for whose protection the statutes were enacted.

Without further discussion or citation of authorities, we think the statute admits of no other construction than that, where the evidence comes within the prohibition of the statute, its reception, if objected to, can be justified only when the patient, penitent, or client, as the case may be, waives the protection the statutes give him.

We are, therefore, of opinion that for the error in the reception of the evidence objected to, the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

UNITED STATES CIRCUIT COURT,  
DISTRICT OF CONNECTICUT.

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PRUDENTIAL ASSURANCE CO. }

vs. }

ÆTNA LIFE INS. CO.\* }

The failure of an insurance company that procures reinsurance to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, is not a valid defense against the insurer's liability upon the policy.

E. C. HENDERSON, *for Plaintiff.*

CHARLES J. COLE, *for Defendant.*

SHIPMAN, J.

This is a demurrer to the second defense in the defendant's answer to the plaintiff's complaint upon a policy of life insurance. The facts admitted to be true, for the purposes of pleading, are as follows: In the year 1854, the National Loan Fund Life Assurance Society, which in the year 1839, had issued to Edward Lawson its policy of insurance upon his life for £3,000, applied to the defendant to reinsure \$5,000 of said risk, which was still outstanding. On making said application, the society represented to the defendant, in order to induce it to issue a policy of reinsurance for said sum, that the risk was a good one,—a most excellent risk,—and they were willing rather to keep \$10,000 at risk on the life than buy the policy; and thereupon, upon the faith and credit of the representation that the society would keep \$10,000 at risk on said life rather

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\* Decision rendered, April 14, 1885. From *Federal Reporter*.

than buy the policy, the defendant issued to said society a policy of reinsurance on Lawson's life for the term of seven years. In the year 1861, on the expiration of this term, the society, the name of which had been changed to the International Life Assurance Society, desired to renew said policy for the term of life. The defendant required a new medical examination of Lawson, so as to show his physical condition at that time, and, the same being furnished, upon the faith and credit thereof and of the previous representations made at the time of issuing the original reinsurance policy, the policy in suit was issued.

In the year 1866 the society reinsured £500 of its said risk in the Royal Insurance Company, of London. In the year 1869, the society ceased business and went into liquidation, and a liquidator thereof was duly appointed. On or about March 30, 1871, the society reinsured the entire risk on Lawson's life. Lawson died in May, 1879, having shortly before his death, and in the same year, surrendered to the plaintiff, for £690, the policy issued to the International Society upon his life. The plaintiff alleges that on March 30, 1871, the official liquidator of the society assigned to the plaintiff, for a valuable consideration, the defendant's policy on Lawson's life, now in suit. This is denied by the defendant. It is agreed that from March 30, 1871, until Lawson's death, the premiums on said policy were regularly paid to the defendant by the plaintiff.

It is not denied that the representations in regard to the character of the risk were true, nor is the willingness of the society, at the time of making the application, to keep \$10,000 at risk denied. An interpretation of the language of the society, in regard to its willingness to keep the specified sum at risk, is that it was then willing or then wished to pursue that course. The defendant interprets the meaning to be that the society represented that it would keep \$10,000 at risk rather than buy the policy. The non-performance of its representations is alleged to consist in the reinsurance of £500 in 1866, and a reinsurance of the whole risk in 1871, after it went into liquidation.

Assuming that the construction which the defendant places upon the language of the original insurer is correct, and that it promised to keep the specified sum at risk, not only through the life of the policy which the defendant issued in 1874, but during the life of all subsequent policies which it might issue on Lawson's life, and that it promised that, upon going into liquidation, no reinsurance should be effected, the question arises, is the failure of the as-

sured to comply with an oral promissory representation in regard to its future conduct, made without fraud or falsehood, before the policy was issued, and not alluded to therein, a valid defense against the insurer's liability upon the policy?

This subject has been considered recently by the supreme court in *Insurance Co. vs. Mowry*, 96 U. S., 544, and by the Supreme Court of Massachusetts in *Kimball vs. Aetna Ins. Co.*, 9 Allen, 540. The extended discussion which was given in these cases to the subject of oral promises made without fraud, prior to the written contract, precludes the necessity of any lengthy argument.

The authorities generally notice the distinction between an untrue representation of a material existing fact, which makes the contract a nullity because the minds of the parties never met and there was no agreement, and an oral promissory representation made, without fraud, before the written contract, in regard to the intention, purpose, or future conduct of the promisor. The latter class of representations, unless incorporated in the policy, are of no importance, "because the written instrument is the expression and the only evidence of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence." *Kimball vs. Aetna Ins. Co.*, 9 Allen, 540. Mr. Justice Gray, who delivered the opinion in this case, further says:—

"But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract."

The insurer is at liberty to compel an observance of promises in regard to future conduct, by incorporating them into the written contract, if it regards a performance as important; but the promise, unless embodied in the contract, is not a part of it. All things to be done by one or the other during the continuance of the written agreement, upon the doing of which the life of the contract depends, must appear in the agreement: *Alston vs. Mechanics' Ins. Co.*, 4 Hill, 329; *Mayor of N. Y. vs. Brooklyn Ins. Co.*, 43 N. Y., 467; *Bryant vs. Ocean Ins. Co.*, 22 Pick., 200; *Insurance Co. vs. Mowry*, 96 U. S., 544.

The case of *Traill vs. Baring*, 10 Jur. (N. S.), 377, and 3 Bigelow Ins. Cas., 233, is not inharmonious with the authorities that have been cited. The facts of that case as stated in the syllabus in Bigelow's Cases are as follows :—

“Insurance company A (having previously granted a policy of reinsurance to insurance company B, on the life of L. I., for £3,000), on the tenth of May, 1851, offered to insurance company C £1,000 of the risk, stating that insurance company D had agreed to undertake £1,000, and that they (company A) would retain £1,000. Company C accepted the proposal without the usual investigation or inquiries into the age, health, or habits of the insured, as a partnership risk. The policy granted by company C was dated and the premium was paid on the eighteenth May, 1861. Company D, on the fifteenth May, 1861, came to a resolution not to, and they did not in fact, retain any portion of the risk, but this resolution and the course of action upon it was not communicated to company C. In 1862 the insured died of the heart disease. Held, that the policy granted by company C was void and must be delivered up to be canceled.”

The gist of the case, as shown in the opinion of the vice-chancellor and of the judges upon appeal, was that when the contract was perfected the representation which had been made was not true, and that the change of intention which took place before the contract was entered into, should have been communicated to the other contracting party. The circumstances bring the case within the principle that an untrue representation of a material, and then existing, independent or collateral, fact, affecting the risk, vitiates the policy.

I have not thought it necessary to consider whether, upon a fair construction of the representations made in 1854, the policy in suit, which was issued in 1861, was properly affected by them, or whether there was any breach of the promise.

The demurrer is sustained.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Lycoming County.*

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LONDON &amp; LANCASHIRE FIRE INS. CO. )

vs. )

LYCOMING FIRE INS. CO.\* )

Where a contract of reinsurance confines the location of the risks within certain limits, then there can be no recovery for a risk located outside of said limits, which is erroneously stated to be within said limits in the schedule of risks accompanying the policy of reinsurance.

1 Messrs. R. P. ALLEN and HENRY C. McCORMICK, for Plaintiffs in error.

Messrs. JOHN J. METZGER and H. W. WATSON, Contra.

TRUNKY, J.

The Lycoming Fire Insurance Company entered into a contract with the London and Lancashire Fire Insurance Company on the second day of March, 1880, by which it was agreed, inter alia: "The said London and Lancashire Fire Insurance Company agrees to pay all losses after 12 o'clock noon, New York time, this day, on all policies issued or renewed prior to this date by the Lycoming Fire Insurance Company on the cash plan, excluding mutual policies, upon risks in the State of New York only, and not elsewhere.

After providing for the terms of payment of premiums, etc., etc., the contract provides in its last paragraph, that, "in order to carry out this agreement the said London and Lancashire Fire Insur-

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\* Opinion filed, March 3, 1884. From *Pittsburgh Legal Journal*.

ance Company agrees to issue to the said Lycoming Fire Insurance Company one or more policies together, reinsuring all their policies as herein stated, as soon as an accurate schedule or schedules of the same can be prepared, subject, nevertheless, to the terms of this agreement."

A schedule of risks was prepared and a policy of reinsurance of said risks was duly executed and delivered.

Subsequently, the mill property of one Thomas Helm, described in said schedule as being located at Trout River, New York, was destroyed, when it was found that the property was located in Canada: whereupon the plaintiff in error refused to pay, and this suit was brought on the policy of reinsurance.

The learned judge of the common pleas rightly ruled, "That there is no sufficient and competent evidence to vary, add to, or contradict the terms of either the contract of March 2, 1880, or the policy of reinsurance sued upon." That was consistent with the plaintiff's (defendant in error) fifth legal proposition, for while parol evidence is admissible to change the terms of a written contract, that adduced may be insufficient. Then, the contract between the parties must be construed by the court, uninfluenced by the conflicting statements of the only two witnesses examined, respecting their conversation at and before the time of its execution.

By the first paragraph of the agreement the defendant agreed to reinsure the plaintiff against all losses on all policies issued or renewed by the plaintiff on the cash plan, upon risks in the State of New York only, and not elsewhere; the consideration being the pro rata gross premium for the unexpired time upon all such policies, less a rebate of thirty-two and one-half per centum on policies on risks outside of New York City and Brooklyn agencies, and less a rebate of twenty-five per centum on policies on risks at New York City and Brooklyn agencies. It is obvious that the words "policies" and "risks" are not used synonymously, that policies means the instruments in which the contracts of insurance are embodied, and risks mean the hazard at the places where the property insured is located. The reinsurer agreed to pay the losses on policy-contracts, upon risks in the State of New York; and in fixing the amount of premium a certain rebate was to be made on policies on risks outside of New York and Brooklyn agencies, and a different rebate on policies on risks within the agencies of those cities. It would be difficult to define the location of the risks in more specific and unambiguous terms. Reinsurance is a contract of



indemnity, and binds the reinsurer to pay to the reinsured the loss sustained in respect to the subject insured, to the extent for which he is reinsured : May on Ina., § 11. That subject was expressed by the word "risks," and the surveys, diagrams, and maps which were to be delivered by the reinsured to the reinsurer, had special reference to the situation of the risks. The provisions of the sixth and seventh paragraphs refer to the policies and risks which are the subjects of the contract, as set forth in the first, and cannot be construed otherwise. These paragraphs contain no definition of limit, they are parts of the instrument, and refer to "the policies and risks hereby reinsured," or "as herein stated." To rule that in these paragraphs the words "risks" and "policies of insurance," are used as synonymous terms, was erroneous, and the plaintiff's seventh point of facts and second legal proposition should have been refused.

Policies of reinsurance were duly issued and both parties claim that they were intended to be in entire accord with the contract. The policy on which this suit is founded relates to about twenty-one hundred risks, and the risk for which the reinsured seeks to recover, was described as located at Trout River, a town in the State of New York, but the actual location of the risk was at Elgin, in the Province of Quebec, Canada. The reinsurer had no knowledge or notice that the risk on the property of Thomas Helm was outside the State of New York until some time after said property was destroyed. From these facts, in connection with the contract and the policy of reinsurance, it was error to infer and find, "That the Thomas Helm risk is included in the policy of reinsurance on which this suit is founded, and was intended to be reinsured by the parties." On the contrary, no risk without the State of New York was included or intended to be included, and the defendant's tenth point should have been affirmed, namely, "That under all the evidence in this case plaintiff is not entitled to recover, and the judgment must be for defendant."

The parties by their contract made location of the risk material, for unless within certain lines it was excluded. They have not stated the reasons for such exclusion, and the reasons are wholly unnecessary to the determination of any point in this action. It is likely true, let it be taken as true, that if the property were located in any of the United States, or anywhere in the Dominion of Canada, that the danger of destruction by fire would be no greater than if within the stipulated lines, but the reinsurer did not choose to undertake

to look after risks, or make proper investigation in case of loss of risks located without those lines. If there is no evidence that the Thomas Helm hazard was in any way increased because his property was situated in Canada, why should the reinsurer be held liable for the loss in defiance of the contract? If a risk beyond the defined limits, without the knowledge of the insurer, may be included by accident or design on the part of the insured, one party, by accident or his design, can gain more than was bargained for, and to that extent the other must lose. The clearly expressed intent shall prevail. It is enough that the risk upon the Thomas Helm property in Canada was not within the State of New York. Whether it be greater, or less, or equal, is a question of no pertinency in the construction of the written instruments.

Were the risk within the contract and false representations had been made respecting its location, it would be necessary to notice the assignments of error relative to the rulings in regard to such representations and the warranty.

Judgment reversed.

## COURT OF APPEALS OF MARYLAND.

CATHERINE A. WEBB

vs.

MUTUAL FIRE INS. COMPANY  
OF BALTIMORE CO.\*

Where, in accordance with the charter, the policy and by-laws prescribed that the policy should be suspended in case of non-payment of interest on any premium-note and not considered binding until such interest be paid, but that the defaulting member should be bound for any assessment in the mean time to pay losses, no recovery can be had for a loss while such interest is in default.

Failure on the part of the company to send the customary notice as to time of payment, will not excuse the non-payment.

ROBINSON, J.

By section II. of the act of 1849, incorporating the appellee, power was conferred on the company to pass by-laws excluding any member failing to pay the interest on his premium-note, according to the constitution and by-laws, from all benefit of insurance; and providing also that such member should be liable to contribution for losses during the time of his default.

In pursuance of this power, article II. of the by-laws prescribed the power of the policy to be issued, and the policy itself contains a stipulation, that in default of the payment in advance of the annual interest on all the premium-notes on or before the first day of March in each and every year, the policy of such defaulting member shall be suspended, and not considered binding on the company until the payment of said interest be made, but that such member shall remain bound for any contribution that may in the mean time be assessed for losses.

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\* Decision rendered, March 10, 1885.

The adoption of a by-law prescribing the power of the policy, containing a stipulation in regard to the default of its members and the suspension of their policies, was an express exercise of the power conferred on the company by the 11th Sect. of its charter.

The policy issued in this case, and accepted by the appellant, followed the by-law; and contained the stipulation, that upon the failure to pay the interest on or before the 1st day of March in any year, the policy would be suspended, and no longer binding until payment made. It is the contract between the parties, and by it their rights and liabilities are to be determined. The appellant on her part agreed to pay the interest on her premium-note on or before the 1st of March in each and every year, and the appellee, in consideration thereof, agreed to indemnify her against loss by fire. And it was mutually agreed upon the failure to pay the interest at the time prescribed, the policy should be suspended and no longer binding on the company. All this is declared in plain and explicit terms. Now, it is admitted the interest due from the appellant on the 1st of March, 1879, was not paid on or before that day, nor had any payment been made down to the occurrence of the fire in November, in the same year, a period of eight months. If then, the terms of the policy mean anything, it is clear the appellant was in default, and if so, the policy was suspended and no longer binding on the company. To hold otherwise would be to disregard the plain and unambiguous terms of the policy, and defeat the very object for which the company was chartered. An agreement between the insurer and the insured, that upon default in the payment of the annual premium within a time prescribed, the policy shall be suspended and no longer binding, cannot be construed to mean that the policy is to remain in force notwithstanding such default. If then, the liability of the appellee is to be determined by the policy itself, it is clear this action cannot be maintained.

But then, it was argued that the appellant was not in default by reason of the failure on the part of the appellee to give the customary notice as to the payment of the annual interest. Not that there was any obligation imposed on the company by its charter or by-laws to give such notice, but there was a custom, it was said, to do so. This question was considered and decided in the *Mutual Fire Ins Co. vs. Miller Lodge*, 58 Md., 463. In that case, as in this, the policy was issued by a mutual insurance company, and in that case, as in this, there was a default on the part of the insured to pay the interest on the premium-note within the time prescribed by

the policy; and, in fact, it remained unpaid, as in this case, at the time of the loss. There was proof to show a custom on the part of the company to send notice to members of the day of payment on the premium-notes, but the court held that as this duty was not imposed by the charter or by laws, the failure to send such notice did not excuse the insured from the consequences of failure to pay at the time designated in the policy—that he was bound to know at his peril when the premium was due and payable. In support of this view, the court refer to *Thompson vs. Insurance Co.*, 104 U. S., 252, in which Justice Bradley says: "The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it; the duty of the assured to pay at the day is the same whether notice be given or not."

Doster's case, 106 U. S., 30, was decided altogether on different principles. There the suit was brought on a life policy issued on the half-note plan, the insured paying one-half of the premium in cash and giving his note for the other half. Under this plan the dividends due the insured from the earnings of the company were applied in the discharge pro tanto of the annual premiums. It was in proof that, prior to the maturity of the premiums, the company was in the habit of sending notices to the insured, showing when the premium was due, the amount of cash to be paid, the interest on the notes, and the amount, for which an additional note under that plan was required. In view of these facts, the court said: "Now, although the policy issued upon Riddle's life required payment annually, of a specific sum as a premium, that stipulation must be construed in connection with the agreement set out in the application that the premium might be discharged pro tanto by such dividends as were allowed to the insured from time to time, whether the company in any particular year declared dividends, and what amount was available in reduction of the premium, were facts known in the first instance only to the company, which had full control of the matter of dividends." Under such a policy as this the court held that it was the duty of the company to give notice to the insured of the amount of dividends to which he was entitled, in order that he might know how much money was required to keep alive the policy. In delivering the opinion of the court, Mr. Justice Harlan was careful to distinguish it from *Thompson's case*, in 104 U. S.

We have nothing to do in this case with that part of the policy which declares that the defaulting member shall, notwithstanding the suspension of the insurance, remain liable for losses. That provision was expressly authorized by the charter, and the appellant accepted the policy with that stipulation on it. If she saw proper to make a contract to that effect, we see no reason why she should not be bound by it. But that question, although fully argued, is not necessary to the decision of this case.

Being of the opinion that the appellant is not entitled to recover, in any aspect in which this case may be viewed, the judgment must be affirmed.

Judgment affirmed.

## UNITED STATES CIRCUIT COURT OF MINNESOTA.

CROSWELL

vs.

MERCANTILE MUT. INS. CO.\* }

Where an insurance certificate, issued under a policy of marine insurance, described the goods as "shipped on board of the Great Western Steamship Company," *Held*, That shipment upon a vessel not owned by the company, but chartered by it and placed upon its line as one of its vessels, satisfied the terms of the contract.

Stipulation is filed waiving a jury. On March 8, 1879, the plaintiff shipped a quantity of flour, by through bill of lading, from Minneapolis to Bristol, England. He applied to an insurance agent in Minneapolis, who gave him a certificate insuring him to the extent of \$1,100. The certificate is in the following form :—

*"Insurance Certificate,*

"1,100, Gold.

No. 63,203.

"OFFICE OF THE MERCANTILE MUTUAL INSURANCE COMPANY,

"NEW YORK, March 8, 1879.

"This is to certify that on the eighth day of March, 1879, this company insured under policy No. 135,723, dated \_\_\_\_\_ 187-, and made for H. J. G. Crosswell, \_\_\_\_\_ dollars in gold, on three hundred and twenty (320) sacks of flour, valued at eleven hundred dollars, shipped on board of the Great Western Steam-ship Company, at and from Minneapolis to Bristol, England and it is hereby understood and agreed that in case of loss, such loss is payable to the order of Chamberlain, Pole & Co. on surrender of this certificate.

"This certificate represents and takes the place of the policy, and conveys all the rights of the original policy-holder (for the purpose of collecting any

\* Decision rendered, January, 1884. From Federal Reporter.

loss or claim) as fully as if the property was covered by a special policy direct to the holder of this certificate, and free from any liability for unpaid premiums.

"C. J. DESPARD, Secretary.

A. W. MONTGOMERY, JR., President."

Indorsed on the side:—

"Not valid without the counter-signature of agent.

"S. S. EATON.

"NOTICE. To conform with the revenue laws of Great Britain, in order to collect a claim under this certificate, it must be stamped within sixty days after its receipt in the united kingdom."

The Mercantile Mutual Insurance Company had issued a running policy to S. S. Eaton, of St. Paul, and given him blank certificates to fill up when a risk was taken. He was its agent, with full authority to act. The running or open policy to Eaton, on account of whom it may concern, is dated March 16, 1878, and did not restrict insurance on merchandise to or from any particular ports, nor prohibit the insurance upon any particular vessel or vessels. The flour was shipped on the steamer *Bernia*, rated "A No. 1," which had been recently chartered by M. Whitwill & Son, promoters and owners of the Great Western Steamship Line, and was lost, with all on board, on the outward trip. Suit is brought to recover amount of insurance.

WARNER & STEVENS, *for Plaintiff.*

YOUNG & LIGHTNER, *for Defendant.*

NELSON, J.

This action is brought on a marine insurance policy to recover for loss of flour shipped from Minneapolis to Bristol, England. The insurance was effected on a running policy to the defendant's agent in St. Paul, and the blank certificate of the amount of the insurance issued by the company, and indorsed by the persons therein named, was filled up by an insurance agent in Minneapolis, to whom the shipper applied. The certificate declares the goods are "shipped on board of the Great Western Steamship Company," without naming any particular vessel, and the special policy which forms a part of the certificate adds, "or by whatever other name, or names, the said vessel \* \* \* is or shall be named or called." No name of the vessel on board of which the freight was laden being named in the policy, the question arises, which, in my opinion, is decisive of the case, does the contract confine the risk to a shipment on board vessels owned by or constituting the Great Western Steamship Com-



pany's line at the date of the policy? The shipment was made on board the steamship *Bernina*, chartered by the steamship company and placed in the line as one of its vessels. This was its first voyage. The shipper, when notified that the flour was laden on this vessel, an extra one of the line, reported the fact to Ames, the insurance agent who had filled up and given the certificate, and was told by him in substance that it would make no difference about the insurance if the vessel was the equal of others in the line. It may well be urged, under all the circumstances, that Ames, who was intrusted with the blank certificates, and authorized to fill them up and take risks, represented the insurance company, and that his assent binds it; but in the view entertained, it is not necessary to so decide. The name of the vessel and the voyage should be correctly given, according to the terms of the policy, and, ordinarily, when the shipper resides at the port of shipment, or can consult the officers of the insurance company, it is done; so that, before concluding the contract, it may have all the data with which to fix the rate of premium. In this case the shipper resided far away from the seaport, and by this contract he was enabled to insure his flour on the presentation of a through bill of lading, it being impossible to designate and name in the policy the particular vessel. No deceit has been practiced, and there can be no prejudice to the insurance company unless this vessel was so unseaworthy, or of a class rated less than the vessels owned by or running in the Great Western Steamship Company's line prior to this voyage.

It is claimed that the premium is greater upon chartered vessels not belonging to a regular line, and testimony has been introduced apparently sustaining this position. I think, however, when we look at the policy and the manner in which the insurance was taken, the name of the vessel has little to do with the risk, and I do not see the mischief supposed to result in this case. It is true the rate of premium depends upon the character of the vessel, the port of destination, the season of the year, and circumstances tending to increase or diminish the hazards, but I do not think the circumstances in this case, that the vessel had been chartered and recently brought into the line, was calculated to increase the risk. If she was fully equal to the other vessels in the class, and had efficient officers and a competent crew, the degree of hazard is not greater. The evidence is complete and conclusive on these points. But the language of the certificate does not limit the shipment on vessels at that time comprising the line. For anything appearing to the con-

trary, the company could sell out all its vessels and purchase or charter new ones, and operate them, and the shipment on a vessel of the line thus constructed would satisfy the terms of the policy. The only restriction is that the flour must be laden on some vessel of the line of the Great Western Steamship Company. This is a reasonable construction of the contract, and the testimony of the officers of this and other insurance companies about the increase of hazard upon chartered vessels, cannot affect its terms and conditions.

Judgment for plaintiff for amount claimed in proof of loss, with interest and costs.

## UNITED STATES CIRCUIT COURT OF MINNESOTA

DECEMBER TERM, 1884.

O'BRIEN

vs.

UNION MUT. LIFE INS. CO.\*

Although in the printed policy and the application for life insurance it is stated that no policy will be considered valid and binding until the premium is paid, a general agent of a foreign company may waive such condition and give credit; and as the evidence in this case shows that the delivery of the policy in suit was unconditional, and that the agent did in fact waive the terms thereof requiring prepayment, the policy should be held valid, and plaintiff allowed to recover the amount of insurance, with interest, after deducting the amount of premium due and unpaid.

THOMAS H. QUIN, *for Plaintiff.*A. D. KEYES, *for Defendant.*

NELSON, J.

This suit is brought by Mary O'Brien against the Union Mutual Life Insurance Company, to recover upon a policy of insurance, dated December 4, 1884, for \$1,000. The insured, Richard J. Vaughan, died March 16, 1883. The evidence showed that among his papers was found this policy on his life, payable to his mother, Mrs. Vaughan, now Mrs. Mary O'Brien, accompanied by a receipt, signed by the agent of the insurance company in the State of Minnesota, for the amount of the first premium; and the policy, with the admission of death and the receipt, being offered, the plaintiff is entitled to a judgment, unless the defendant can overcome the prima facie case presented upon the proof thus offered by the plaintiff. The policy contains the following clause:—

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\* From Federal Reporter.

"If any premium, or any installment of premium on this policy shall not be paid when due, the consideration of this contract shall be deemed to have failed, and the company shall be released from liability, except as hereinafter provided; and the only evidence of payment shall be the receipt of the company, signed by the president or secretary."

And again:—

"The contract between the parties hereto is completely set forth in this policy and the application therefor, taken together, and none of its terms can be modified, nor any forfeiture under it waived, except by an agreement in writing signed by the president or secretary of the company, whose authority for this purpose will not be delegated."

The application for insurance substantially recites the same provision. In the application, which is a part of the policy, it is stated:—

"That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company, and the first premium thereon actually paid, during the continuance of the life proposed for insurance in the same condition of health as described in the application."

It appeared upon the trial that the application for insurance was taken on the solicitation of J. J. Hart, acting on the behalf of the defendant, who made it out and sent it to Minneapolis to the manager of the company for Minnesota and Dakota, A. K. Shattuck, who has general charge of the defendant's business. The application was dated November 27, 1882. No premium at that time was paid to Hart, but Vaughan promised to pay for the policy as soon as it issued and was delivered. The application was sent to the superintendent of the Western agencies at Chicago, and in due course of time the policy in suit and receipt, dated December 4, 1882, were received by the Minneapolis agent, who entered it in his register of policies, and inclosed it in an envelope with the following letter, dated December 11, 1882, and sent it to Vaughan:—

"DEAR SIR,—Inclosed find your policy 76,494. The first semi-annual premium will be due December 15, 1882. We trust you will find your policy satisfactory.

"A. K. SHATTUCK, Manager."

The books of the company, and the evidence of the manager, show that no premium was ever paid, and an effort is made to show by the evidence of Hart—and he so testified—that in a conversation with Vaughan before he died, and five or six weeks after the

policy was sent by the Minneapolis agent, he stated that "he would give up the policy, as he did not feel able to pay for it, and would return the policy to Shattuck." He never did so, however. I hardly think this testimony is admissible, Vaughan being dead, and no one present at the conversation but Vaughan and witness. However, giving it full force and effect, in connection with the other evidence of the defendant's witnesses, Messrs. Shattuck and Lawrence, it is clear to my mind that the company, through its agent, waived the cash payment and delivered the policy, giving him time to pay the premium. In so doing, the contract of insurance was complete, whether the company charged the agent with the amount of the premium when the policy was delivered without actual payment or not, and although no return of premium was ever made to the company.

The defendant received the policy in December, 1882, and as late as January 9, 1883, the manager addressed a letter to Vaughan, calling his attention to the amount of premium due and requesting its payment, thus recognizing the contract of insurance. It was not unusual for policies to be delivered without cash payments, as appears by the testimony, but in every instance previous time-notes were taken for the amount of the premium due, and these notes were furnished the agents by the company. It is urged that the company's agent or manager had no authority to deliver policies without the payment of the semi-annual premium, or receipt of a note for it; but the facts in the case, including the letters of the agent, Shattuck, show clearly a credit was intended; and it is well settled that although in the printed policy and application it is stated that no policy will be considered valid and binding until the premium is paid, yet an agent like Shattuck, representing a foreign company, may waive such condition and give credit, and such appears to be the manner of conducting the business of the company by the manager in this State. There is no evidence that the policy was delivered to the assured on condition that the premium should be paid or the policy returned. Vaughan agreed with the solicitor Hart, November 27, 1882, to take the insurance and pay the premium when he went to Minneapolis, or send the money, and the policy was delivered on such terms. He failed to fulfill his promise and did not return the policy. That such failure did not render the contract of insurance invalid, and that the manager did not so regard it, is clear; for, as late as January 9, 1883, he wrote a letter to Vaughan, above referred, which reads as follows:—

January 9th.

"RICHARD J. VAUGHAN, FARIBAULT, MINN.

"DEAR SIR:—Please remit \$16.13, the first semi-annual premium on your policy of \$1,000. It was due the first of this month, but we overlooked you. Please respond at once.

"Respectfully, A. R. SHATTUCK."

This letter recognizes the contract of insurance as valid and subsisting. If agents of insurance companies do not intend to give credit for the payment of premiums, they should not deliver the policies without payment. There is no evidence in this case to indicate a conditional delivery of the policy. On the contrary, I am of the opinion that the agent waived the terms of the policy requiring the prepayment of the premium before the policy took effect, which was binding upon the company. The plaintiff is entitled to a judgment for the sum of \$1,000, with interest from May 29, 1883, to date, deducting the amount of the premium due, \$16.13. Judgment will be entered for that amount.

## COURT OF APPEALS OF NEW YORK.

JAMES JACKSON, RECEIVER ETC., *Appellant*,

vs.

ST. PAUL FIRE & MARINE INS. CO., *Respondent*.\*

The P. company issued a policy on a "one and one-half story, hard-finished, frame boarding-house," and subsequently reinsured part in the S. company under the same description. The P. company having resisted payment on the ground that only the lower story was hard-finished, was defeated.

*Held*, That the S. company was liable to the P. company under the reinsurance contract whether the description was true or false, so long as it was made by the P. company in good faith. It insured the interest of the P. company, and its liability was determined by the liability of reinsured. It was not open to the reinsurer to inquire into the merits of questions between the insured and the original insurer.

*Held*, That the arbitration clause has no force in a contract of reinsurance, there is nothing to arbitrate since the liability is fixed by the liability of the original insurer.

MR. STEVENSON, *for Appellant*.MR. HOXIE, *for Respondent*.

DANFORTH, J.

The questions upon this appeal relate to the liability of the defendant on a contract of reinsurance made by it in favor of the Paterson Fire Insurance Company, and are, first, whether it was obtained by misrepresentation, and so void, *ab initio*, and if not, then second, whether the action is barred by a limitation clause contained in the contract.

The facts agreed upon or found by the trial court, so far as material, are these: the Paterson Company, on the 14th of August, 1876,

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\* Decision rendered, May 5, 1885.

at San Francisco, undertook to insure one E. Sherwood against loss by fire to the amount of \$4,500, as follows : “\$3,000 on his one and one-half story, hard-finished, frame, boarding-house building, \* \* \* and \$1,500 on furniture etc., contained in it.” On the next day its agent addressed to the defendant a written application, saying : “Reinsurance is wanted by the Paterson Fire Insurance Company for \$1,500, from August 14, 1876, to August 14, 1877, on their interest as insurers, under their policy No. 582, issued to E. Sherwood \* \* \* covering \$4,500, viz.: \$3,000 on his one and one-half story, hard-finished, frame, boarding-house building \* \* \* and \$1,500 on furniture,” etc., “contained therein.” The application was granted and the defendant issued its policy, which recited that “The Saint Paul F. & M. Ins. Co., of St. Paul,” “do reinsure” the Paterson Company “against loss or damage by fire to the amount of \$1,500 on their interest as insurers under their policy No. 582, issued to E. Sherwood,” and then follows in the language of the application a statement as to the amount and distribution of insurance, and description of the property insured under that policy.

Upon the trial, it was admitted that in 1876, “a fire occurred and destroyed the property insured in policy 582, to the amount of \$4,100.” The Paterson Insurance Company declined paying. They were sued, and after notice to the defendant of the claim made and pendency of the action, a trial was had and judgment obtained against them for the amount claimed, with costs.

The plaintiff was subsequently appointed receiver of the property and assets of the Paterson Company, and brought this action to recover the amount due according to the terms of reinsurance. Before the trial court he succeeded. The general term, however, reversed the judgment, and the respondent seeks to sustain that decision upon grounds involved in the questions above stated.

First, as to misrepresentation; it was admitted upon the trial that Sherwood’s “house was hard-finished on the lower story, but the rooms and hallway composing the upper or half-story were cloth-lined, and not hard-finished, but notwithstanding this the court found that the general character of the building was correctly stated in both policies. It is quite unnecessary to consider whether the interior finish of the building would warrant the epithet applied to it, for as to that there was in our opinion no representation by the Paterson Company. They had no property right in the subject insured by them, but by underwriting the policy rendered themselves liable to loss from fire, and they thereby acquired an insurable in-



terest to the extent of that liability, but it was in relation to the peril only, against which they had insured. It is that to which their request for reinsurance applies. By it they in effect say, as insurers, we have undertaken to carry a risk which, as taken by us, is as follows: "It amounts to \$4,500, and we ask indemnity against a portion of it."

It is not pretended that they did not state the risk literally as they had taken it, and it was in fact described in their policy in terms similar to those used in the policy of reinsurance. The case may indeed be taken in like manner as if they had exhibited to the defendants the original policy, and the defendants had indorsed upon it an assumption of the risk of \$1,500. In either way, by indorsement or by a new writing, they became charged with so much of the amount as the Paterson Company had put in jeopardy, and to that extent became bound to relieve it.

The original contract of insurance remained as at first, and the reinsurer came under no contract obligation to the owner of the property described in it. The subsequent act of the insurer did not create any. Its own risk was the sole object of reinsurance and formed the consideration of a new and independent contract, distinct from and unconnected with the original insurance. This is so stated in the policy of reinsurance. It covers in terms the plaintiffs' "interest as insurers" under their policy, and nothing else; that is made the subject-matter of insurance.

When, therefore, the Paterson Company were found to be legally liable upon their contract, and the amount was ascertained, it was not open to the reinsurers to inquire into the merits of those questions. They were at once bound to pay the reinsured such a proportion of the loss as their reinsurance bore to the sum originally insured.

The other objection rests upon a clause in the policy which provides that no action "for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until after an award shall have been obtained, fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur." This clause formed part of a blank form, intended as an ordinary contract of insurance where the assured had an interest in the property, was required to make proofs of loss by fire, and submit his claim to arbitrators if required and fulfill many other conditions in no respect applicable to a case where the perils

of a contract of primitive insurance only is involved, and when the loss or damage is the amount of liability under it.

Such is the contract under which the plaintiff claims, and its right to recover is unaffected by these stipulations.

It follows that the order of the general term should be reversed, and the judgment of the special term affirmed, with costs.

All concur.

## SUPREME COURT OF MINNESOTA.

SALISBURY AND OTHERS

vs.

HEKLA FIRE INS. CO., OF WISCONSIN.\*

Defendant, by oral agreement, insured plaintiffs' property, a written policy to be subsequently issued. A loss occurred, and afterwards defendant made and delivered to plaintiffs a written policy. *Held*, That the policy, as against plaintiffs, was not conclusive as to the terms of the insurance, but was only evidence as plaintiffs' admission of those terms, and might be rebutted by proof of the oral agreement.

Where there is an oral contract of insurance, a policy to be subsequently issued, and nothing is said about conditions, it is presumed that the parties intended to have inserted in it the conditions usual in such cases, or such as have been before used by the parties.

That a particular condition is usual must be shown by the party who insists on it.

Appeal from an order of the district court, Hennepin county, denying motion for a new trial.

J. S. Root, *for Respondents*.

ATWATER & HILL, *for Appellant*.

GILFILLAN, C. J.

Defendant, by its agent at Minneapolis, made orally a contract with plaintiffs, acting by their agent, insuring plaintiffs' building, used as a manufactory, in the sum of \$150, and the stock and machinery therein in the sum of \$350, against loss by fire, for a premium at the rate of 6 per cent on the amount of insurance for one year, the risk to commence at once, to wit, February 17, 1883; a written policy to be made and delivered as soon as could be done. The premium was not then paid, and nothing was said as to when it

\* Opinion filed, November 29, 1884. From *N. W. Reporter*.

should be. On the night of February 18th, the manufactory then running, the property insured was destroyed by fire. On the morning of the 19th, after the fire, defendant's agent delivered to plaintiffs' agent a policy of insurance. February 23d, plaintiffs paid the premium. In the oral agreement nothing was said about any conditions or restrictions of insurance. In the policy delivered there was a condition that it should be void if the manufactory should run at night or overtime, or cease to be operated, without the consent of defendant indorsed on the policy.

The controversy is as to whether that condition attached to the contract of insurance under which the loss occurred. Was that condition a part of the contract existing at the time of the fire? Unless it was, it has no influence on the rights of the parties. Whether it was or not must be determined by what was said between them or agents when the insurance was effected. The written policy made out by the defendant after the fire, of course, cannot be conclusive. Indeed, having been made after the liability accrued, it would be no evidence of the contract at all, were it not for its delivery to and retention by plaintiffs. Such delivery and retention may be taken as an admission by plaintiffs that it set forth the terms of the contract as agreed on, which might be rebutted by proof of what the contract actually was. And in view of the fact indicated by the evidence, that the plaintiffs did not read it, it would not be very strong evidence as an admission. It stands on an entirely different footing from a policy delivered and accepted before the loss. For in that case, if there be no fraud or mistake, the policy in the contract (from the time of its delivery, at any rate), no matter what may have been the negotiations which led to it, and proof of such negotiations is not admissible to contradict its terms.

This policy did not exist and was not the contract at the time of the fire, when defendant's liability accrued. The only contract then in force was oral, and the rights of the parties must be measured by it. Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative. There was no evidence that such a condition as this is usual.

Order affirmed.

## LOWER COURT DECISIONS.

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### LEVY NOT A CHANGE OF POSSESSION.

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*Superior Court of Kentucky.—Appeal from the Louisville Chancery Court.*

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WESTERN ASSURANCE CO., OF TORONTO, *Appellant*,

*vs.*

M. LAYER *ETC.*, *Appellees*.\*

The sheriff levied on the stock of a manufacturer and placed a bailiff in charge with instructions not to interfere with the work of manufacturing, but not to allow anything removed. The manufacturer under these restrictions continued his business.

*Held*, that the possession of the sheriff was but a qualified possession, and not a violation of the condition of the policy against change of title or possession by legal process or judicial decree.

R. W. WOOLBY, *for Appellant*.

JAMES CALDWELL & A. A. STOLL, *for Appellees*.

BY THE COURT.

This is a contest between appellants, insurance companies, and appellees, attaching creditors of H. W. Meyer. Meyer insured his soap-factory and contents; they were destroyed, and his creditors are seeking to subject to their debts the amount which they claim to be due Meyer by the insurers.

The companies say that each of the contracts of insurance contained this stipulation or agreement: "If the property be sold or transferred, or any change takes place in title or possession (except

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\* Decision rendered, February 26, 1885.

by succession by reason of the death of the insured), whether by legal process or judicial decree, or voluntary transfer, or conveyance, then, and in every such case, this policy shall be void."

They say that before the destruction of said property the sheriff of Jefferson County, the county in which the property insured was located, by virtue of an execution in his hands levied upon said property, took possession thereof, by putting a special bailiff in charge thereof, that Meyer was divested of ownership and possession, and the contract of insurance was broken, and they absolved from further liability for the loss. This is denied.

The facts are, that the sheriff did have an execution against Meyer, and he went to Meyer's place of business, took an authorized list of his stock, machinery, and all the material in the factory at the time, indorsed the levy on the execution, and told Meyer he had levied upon it and it must not be removed. The sheriff appointed Jacob Biehl, who was a neighbor of Meyer's, a special bailiff, and instructed him not to allow Meyer to remove anything from the building, but told him not to interfere with Meyer in his business of manufacturing the raw material into stock, and the sheriff gave Meyer the privilege of manufacturing, but not of removal. Meyer was left in possession to manufacture. Biehl was left in possession or authority, to see that the property was not removed. Meyer kept the keys of the house, at least it is not shown that any one else had them. Meyer continued to manufacture goods, and Biehl took care of them. The execution was levied on the 6th of October, 1880, the property was destroyed on the night of the 11th of October, 1880. Meyer told the sheriff he would replevy the execution in a day or two after the levy, and the party who was to go on the bond, told the sheriff that he would do so, but after the fire that he would not.

The sheriff says, "I did not leave Meyer in possession of said store and goods levied on. Jacob Biehl, my special bailiff, was in possession of same from date of levy." But again the sheriff says: "I left them in possession of Mr. Meyer and I told my bailiff not to interfere with him in his business in the factory, but to see that nothing was removed." So it is evident that the sheriff was in each case, from the two standpoints, aiming to give a conclusion from the facts, and so far as he attempts to state a conclusion, his evidence is not proper or competent.

Appellants earnestly insist that these facts show that the condition of the policy named above was broken and that they are not liable.

We have examined a number of adjudged cases, but have not

found one exactly like this, indeed we do not know that that was to be expected. Some differ in the terms of the policy, aiming at the same agreement in effect, some differ as to the character of property insured, whether real or personal, some in what was done looking to a divesture of interest or possession. But the drift of all the cases is to uphold and sustain the agreement so as to protect the rights and interests of all concerned, not to put any strained conclusion on the words employed, or to allow by latitude such a construction as will destroy the efficacy of the restriction, and thereby make the insurance company the prey of its policy-holders. Keeping this in mind, it seems that the provision was intended, in the first place, to provide that the policy should be void, whenever the policy-holder parted with his insurable interest in the property. As he could not, in the first place, insure property in which he did not have an interest, it is proper for him to agree that whenever he is divested of that interest, the policy shall cease. Secondly. The contract is a personal one, and therefore the insurance company has a right to bargain for the personal control of the property by the party who has the personal interest, and when that personal control or possession has been destroyed or impaired to such an extent that he cannot control the property for his own and the company's goods, the protection ceases. We do not think the facts of this case bring it within either of the exceptions. The interest which the sheriff acquired by the levy of the execution, was but a qualified interest; he had special interest in the property to sell it, not as his own, not as the plaintiff's, but as the defendant's. He had the right to sell only so much as was necessary to pay the debt. The defendant still owned it; its injury, loss, or destruction, unless by the neglect of the sheriff, would be the loss of the defendant until sold. Its sale would pay in whole or part his debt, and until so sold was his. The possession of the sheriff was a qualified possession, it was not absolute or exclusive, either in theory or fact, except to prevent its use for a purpose other than to satisfy the debt. It was a possession in no way opposed to a possession by the execution-debtor, so far as necessary, to preserve the property from spoliation or destruction. It cannot be said that the possession of the bailiff to prevent removal, meant to prevent the removal in case of fire. Such an instruction from the sheriff might have made him liable for neglect, if in fact the property could have been removed. It is shown beyond question that Meyer was in possession to enhance the raw material by manufacture, and if possession to increase in value, why not to protect? We have at least two cases in Kentucky so

nearly similar to this in fact, and so fully similar to it in principle, that we deem it unnecessary to examine minutely other cases referred to by eminent counsel for appellant. They seem to be conclusive of this case. We refer to the case of *Ætna Ins. Co. vs. Jackson*, 16th Ben. Min., 264 to 274; *Phoenix Ins. Co. vs. Lawrence*, 4th Mek., 15.

The judgment is affirmed.



## AGENT'S AUTHORITY TO REVIVE A LAPSED CONTRACT.

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*Marion Co., Indiana, Superior Court.*

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MARGARET E. PAINTER

vs.

INDUSTRIAL LIFE ASSOCIATION, OF INDIANAPOLIS.\*

The membership in a benevolent association had lapsed through non-payment of assessment, and five days thereafter the insured had died, while, as claimed, on his way to the office to pay the assessment. It was claimed that an agreement had been made with a soliciting agent that it might be paid at that time and he be treated as a member in good standing. The by-laws provided that members might be re-instated by the company on payment of assessments and furnishing certificates of good health. One of the rules of the company made part of the contract, provided that no agent should make any agreement which he was not authorized to make.

*Held*, That the agent had no authority to agree to the re-instatement without the consent of the company.

*Held*, That a statement of an officer that the money would have been received if tendered, was not competent evidence.

WALKER, J.

The husband of the appellee on the 19th day of August, 1879, made an application for insurance on his life in favor of the appellee herein, and on that day a certificate of insurance for the sum of two thousand dollars was issued by appellant in accordance with the application. The premium for the insurance was payable monthly in assessments of certain specified amounts, and a failure to pay any assessment according to the terms of the by-laws, worked a forfeiture of all rights under the contract of insurance.

The monthly payment to be made by the terms of the by-laws, fell due on the first day of each calendar month, with the remainder of

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\* Decision rendered, February 3, 1885.

the month allowed as days of grace for the payment; the membership not to cease until after the expiration of the days of grace, but if any monthly payment was not made at the appellant's home office within such time, the membership ceased and the certificate became null and void. The monthly payment due from the deceased became payable on the first day of December, 1879, with days of grace extending to January first, 1880. He died, it is alleged, on the fifth day of January, 1880, on his way to the office of appellant to pay his delinquency. It will be seen that by the terms of the contract of insurance he ceased to be a member after the last day of December, 1879, and that by reason thereof the policy of insurance was forfeited. The by-laws further provided that lapsed members might be re-instated at any time within thirty days after final lapse on payment of all back dues and giving a "certificate of good health," subject to the risk of death or impairment of health in the interval between the date of lapsing and the restoration." The contention was that the deceased had made an agreement with an agent of the company on the third day of January, 1880, to pay the monthly dues on the fifth following; that he should be considered a continuing member, and that he died on that day while going to make the payment; that the amount was tendered after his death; that the company on two former occasions had accepted such payments after the expiration of the time of payment without requiring the "certificate of health." The trial resulted in a verdict for the beneficiary and against the company for the amount of the insurance stipulated in the certificate.

The appellant claims a reversal on the ground that the verdict is not sustained by sufficient evidence, and is contrary to law. When in default for payment on the two occasions referred to, the deceased instead of producing the certificate of health required by the regulations of the company presented himself in person to the "home office" when he was interrogated as to his health; and on what the company deemed sufficient evidence, was restored to membership, in one instance two, and the other four days after the expiration of the days of grace. The company could waive the requirement of the "certificate of health" and accept in lieu thereof the statement of the party that he was in good health, or it could have required less and accepted the payment and restored the party without any inquiry. But that furnishes no reason to support the theory of the appellee in this case. He did not present himself to the appellant in good health as on the other two occasions and make the payment, and ask a restoration to membership. Will doing what he did, on

the third day of January, continue his membership? or rather will it restore him to a membership that had lapsed on the last day of December, 1879? It appears that Mr. Joseph, with whom the agreement is said to have been made in relation to the payment to be made on the fifth of January, was a soliciting agent of the appellant. The question is, could he make such an agreement, if not, was the agreement if such it can be called, that was attempted to be made, afterwards ratified by the appellant with a full knowledge of the facts in relation thereto? It was provided in one of the rules of the company, and made a part of the contract of insurance that no agent should collect or transmit any monthly payment, or make any pledge, or agreement, or promise, not specially authorized to make, and forbidding such agents from attempting to bind the company by any such acts.

Joseph, the agent of the defendant, being a mere local agent by virtue of the rules of the defendant, had no authority either to modify the contract between Painter and the defendant, nor to waive any of its provisions, but was expressly prohibited from so doing. If you find that he did attempt to modify said contract or to waive any of its provisions thereof, the defendant is not bound thereby unless you find—and the burden is upon plaintiff to prove this by preponderance of the evidence, either—

1st. That the defendant gave Joseph such authority in addition to what was given him under the rules, or—

2d. That after he made such modification or waiver, if he did so, the defendant with full knowledge thereof and all the material facts connected therewith ratified the same.

If you so find, then the defendant will be bound by such modification or waiver, notwithstanding any restriction or prohibition to the contrary contained in its rules or by-laws.

In determining whether there was any such authority given to Joseph to make such modification or waiver, and also in determining whether, if no such authority was given, the unauthorized exercise of it by Joseph (if he did exercise such authority) was afterwards ratified by the defendant. You may consider all the facts proved, if any, as to the failure of Painter promptly to pay monthly payments prior to the one last due, and the subsequent receipt, if any thereof by the defendant; what demand, if any, was made of Painter after the expiration of the days of grace allowed by the rules for the last monthly payment due from him, together with all the facts and circumstances, if any, proved tending to show that the

defendant continued to recognize or induce Painter to believe that it recognized the continuance of the contract with him after the expiration of the days of grace allowed by the rules for the payment of such last monthly payment; for if the defendant so acted as to induce Painter to believe that it recognized the continuance of the contract and he so believing, acted upon it as continuing, then the defendant is bound to the same extent as if it did in fact recognize it as continuing."

No instruction more favorable to appellee could probably have been given. But under the instruction, were the jury warranted in coming to the conclusion they did?

There is no claim whatever that the agent was given any such authority by the rules of the appellant or otherwise. The only evidence on the alleged agreement was that contained in a deposition of a witness by the name of Jones, who testified in substance that on the 3d of January, he was talking with Mr. Painter about collecting a bill when Mr. Joseph, the agent, came up and told Mr. Painter that his premium was due. Mr. Painter said, "Is that so? Will it do if I pay Monday?" Mr. Joseph said, "yes, if you will do it at that time, but after that it is at your own risk." Painter said he would be there Monday. It is not shown that this conversation was ever communicated to the appellant, or any officer of it. There is no evidence upon which the conclusion could be reached that there was any ratification or approval of the conversation of the local agent with the deceased. Mr. McCune, a witness in the cause, testified that after the death of the insured he went to the office of the appellant to see about getting the papers to prepare proof of death, and they refused to furnish them on the ground that the policy had lapsed by reason of non-payment of dues. He further testified that he had a faint recollection of saying to the president that Mr. Joseph had been to see Mr. Painter, and that they argued the case as to whether it would have been right for him to pay or not, and about Mr. Joseph going to see Mr. Painter, and wanting to take the money from him and he would send him a receipt; and over the objection of the appellant, witness was permitted to say in answer to his question to the president, as to whether in his opinion the money would have been received if he had paid it that afternoon (the day of his death), that such officer answered, it would have been received. The answer of the officer as to what would have been done under certain circumstances was not competent evidence, and should have been excluded. It was immaterial as to

what would have been done if the party had lived and presented himself with the money for payment, The question is rather what was done. There is no evidence adduced by this witness to show any approval of the conduct of the local agent. The conversation, which is faintly remembered as being had with the president, is not the conversation detailed by Jones, and does not occur anywhere else in the evidence, and besides he was then informed that the policy was forfeited. It is difficult to see how any evidence of satisfaction can be discovered in this interview, and it is the only evidence upon which any ratification is claimed. If the president had attempted to do any act by which the appellant would be bound even his authority might well be questioned. See *Franklin Life Insurance Co. vs. Sefton, Admr.*, 53 Ind., 380; *Wilcutts vs. Northwestern Ins. Co.*, 81 Ind., 300. But that question does not arise, as he did not act looking toward a ratification, but, on the contrary, declared the policy to be void, and refused the papers upon which to prepare a statement of death. As the insured met death after he had been in default on his monthly assessment for five days after the expiration of the thirty days of grace given him, under the rules of the company, and as the conversation with the local agent was not a valid or binding agreement upon the appellant. The agent having no authority to make any such agreement, and the same never having been brought to the knowledge of the appellant, and by it any way ratified, the contract of insurance must be deemed to have been rendered invalid, on account of the non-payment of the assessment due from the deceased. The verdict of the jury is, in my opinion, not sustained by the evidence; in fact that there is an entire failure of proof. If it be said that this conclusion resulted in a hardship to the appellee, it will be admitted. The facts are such as "excite a wish" that it could be otherwise, but the law is not always kind, and does not readily yield to instances, even of exceptional hardship, and especially in cases when the parties themselves, by contract, have made such consequences inevitable. In my judgment the cause should be reversed.

Judgment reversed.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

ACCIDENT.

§ 123. ACCIDENT.—*What Constitutes within the Policy.—Question of Fact.—Proximate Cause of Death.*—In an action on an accident insurance policy the question whether deceased was injured by jumping from a platform as alleged, is a question of fact for the jury to determine from all the circumstances of the case as shown by the evidence. The term “accidental,” as used in an accidental policy, is used in its ordinary sense, and means “happening by chance, unexpectedly, or not as expected.” An injury that is internal may afford external indications or evidences, which are visible signs of the injury within the meaning of such term as used in an accident policy. In an action on

an accident policy where it is shown that the deceased sustained an accidental injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

*Barry vs. U. S. Mut. Accident Association.*

Rep'd Jour'l, p. 603.

WIS. U. S. C. C.

#### BENEFICIARIES.

§ 124. *LIFE.—Construction of Policy as to Wife and Children.—Effect of Will.*—The policy provided that the sum collected on assessment should be paid to his wife M. and children, or their legal representatives. *Held*, That the children of a former marriage were entitled to share in the distribution as beneficiaries. The name of the wife is descriptive of the person and not a designation of whose children are intended. *Held*, That the provisions of a subsequent will of insured cannot aid in interpreting the policy where the will simply directed a division of this property between his wife, his children by the first marriage, and a step-son.

*Koehler et al. vs. Centennial Life Association.*

Rep'd Jour'l, p. 619.

IOWA S. C.

#### BENEVOLENT SOCIETY.

§ 125. *LIFE.—Is a Life Company within the Statute.—Unauthorized Business.*—The Ancient Order of United Workmen is to be regarded as a life insurance organization, and as the supreme lodge organized in Kentucky has not the guaranteed capital required by code Iowa, § 1,160, it could not do business in Iowa, and the grand lodge of that State was not bound to obey its mandates in relation to the relief law; and the provisional grand lodge, formed after the suspension of the grand

lodge for a refusal so to do, is not to be considered as the grand lodge of Iowa, and as such entitled to all the rights, privileges, and franchises of the order.

*State vs. Bankers' Ass'n.*, 28 Kan., 499; *Folmer's Appeal*, 87 Pa. St., 133; *Masons' B. Soc. vs. Winthrop*, 85 Ill., 537; *Same vs. Baldwin*, 86 Ill., 479; *State vs. Citizens' Ass'n.*, 6 Mo. App., 168; *Bolton vs. Bolton*, 73 Me., 299; *Lamphere vs. Grand Lodge A. O. U. W.*, 47 Mich., 429; *s. c.*, 11 N. W. Rep., 268; *Grand Lodge A. O. U. W. vs. Stepp*, 14 Pittsb., Leg. J., 164.

*State vs. Miller.*

Rep'd Jour 1, p. 611.

IOWA S. C.

### BENEVOLENT SOCIETY.

§ 126. *LIFE.—When Assessment is not Binding.*—Where the assessment in a benevolent order was not made in the manner required by the constitution and rules, on a subordinate lodge, a notice from the secretary of the latter, calling for the payment of a death-claim for which the assessment should have been made, is not binding upon the members, and a failure to respond to such notice will not forfeit the rights of the member. A member is not bound by usages and customs of the order in regard to assessments, of which he is not shown to have had knowledge.

*Underwood vs. Iowa Legion of Honor.*

Rep'd Jour'l, p. 626.

IOWA S. C.

### CANCELLATION.

§ 127. *FIRE.—Proof of.—Authority of Agent.*—An offer which relates to the attempted surrender and cancellation of the policy and contains no offer to prove any authority in the agent to receive and cancel the policy, was inadmissible. A power to receive applications, premium-notes, and cash premiums, does not include a power to cancel policies. Nor is the offer helped by showing that the policy was sent by the agent to the company as a surrendered policy, unless the company accepted it as such.

*Jacobs vs. Susquehanna Mut. F. Ins. Co.*

Rep'd Jour'l, p. 633.

PA. S. C.

### EVIDENCE.

§ 128. *FIRE.—Overvaluation, Knowledge of Agent.—Reading of Paper.—Admission of Immaterial.—On Former Trial.—After Cross-examination.*—In an action on a policy of insurance, where



the defense is overvaluation, it is competent for the plaintiff to prove that insurance was effected the year previous on the same property in another company, through the same general agents by whom the policy in suit was issued, and that before the former policy was issued an agent examined and valued the property, although such agent was not the agent of the defendant company. Such evidence is admissible, not on the ground of binding the defendant with the knowledge acquired by such agent, but to show what information the general agents were in possession of when they issued the policy in suit. The court may permit a paper to be read in evidence before its execution has been proved, when the party introducing it undertakes, at a subsequent time, to prove the execution. Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies. The admission of immaterial evidence cannot be assigned as error. It is incompetent to prove what a witness swore on a former trial, when the witness can himself be put on the stand. Where a witness has been questioned in regard to certain matters in his examination in chief, it is discretionary with the judge whether he will allow further questions to be asked the witness in regard thereto, after the cross-examination has been completed. Refusal to allow further testimony after the case has been closed, is matter of discretion and not subject to review.

*Dupree vs. Virginia Home Ins. Co.*

Rep'd Jour'l, p. 577.

N. C. S. C.

#### INSURABLE INTEREST.

§ 129. FIRE.—*Of Lessee.*—Where the building insured was erected by the lessees, with an agreement on the part of the lessor to buy at the termination of the lease, the lessees had an insurable interest, and were entitled to recover for the loss.

*Allen et al. vs. Sun Mutual Ins. Co.*

Rep'd Jour'l, p. 575.

LA. S. C.

#### OTHER INSURANCE.

§ 130. FIRE.—*Knowledge of Agent a Waiver of Forfeiture.*—

The application which was a warranty, was silent as to the effect of other insurance, and a question therein as to what other insurance existed was not answered. The application was made through a soliciting agent who was authorized to deliver policies and receive premiums, but not to fill blank policies. The policy provided that it should be void in case of other insurance not made known. The agent was informed that other insurance would be applied for when the application was made, and was afterwards notified that it had been procured and requested to notify the company, in all of which he acquiesced. *Held*, That the knowledge and conduct of the agent was a waiver of forfeiture.

Citing and discussing *Western Ins. Co. vs. Riker*, 10 Mich., 273, and *Security Ins. Co. vs. Fay*, 22 Mich., 467; *Allemania Fire Ins. Co. vs. Hurd*, 37 Mich., 11; *Westchester Fire Ins. Co. vs. Earle*, 33 Mich., 143.

*Kitchen vs. Hartford Fire Ins. Co.*

*Rep'd Jour'l*, p. 594.

MICH. S. C.

## PRACTICE

§ 131. FIRE.—*Continuance.—Issues when Sufficient.—Charge.*—The granting or refusing a continuance is entirely discretionary with the presiding judge, and cannot be assigned for error on appeal. Issues which embrace all the substantial matters of defense developed in the pleading and necessary to a determination of the action, are sufficient. When requested to do so in apt time, the judge must put in writing so much of his charge as embodies principles of law, but he cannot be forced to put the recapitulation of the evidence in writing. It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury.

*Dupree vs. Virginia Home Ins. Co.*

—1 128.

## PREMIUM-NOTE.

§ 132. FIRE.—*Attachment of Assessment.*—A premium-note is not an absolute obligation until assessment has been made and notice given. Attachment therefore cannot be maintained for an unpaid assessment of which no notice had been given.

*Appeal of Susquehanna Mut. F. Ins. Co.*

*Rep'd Jour'l*, p. 631.

PA. S. C.

## PREMIUM-NOTE.

§ 133. FIRE.—*Verbal Agreement of Agent as to Assessment.*—In a suit by a mutual assurance company against one of its members, for an assessment, defendant alleged that the assessment should be upon the basis of \$30 cash, as that was the way the agent had agreed on. *Held*, That this verbal agreement with the agent was not effective, as the application contained a positive stipulation that the company was not bound by any statement unless inserted in the application in writing.

*Jacobs vs. Susquehanna Mut. F. Ins. Co.*

—127.

## RISK.

§ 134. FIRE.—*Increase of by Tenant.*—*Question for Jury.*—Where a tenant, without the knowledge or consent of his landlord, performs an act which increases the insurance risk on the premises held by him, contrary to the stipulation of the policy; *Held*, That the fact that the act was that of the tenant, and even unknown to the landlord, was no excuse for the infringement of the covenants in the policy, and that the latter could not recover against the company. The question whether the temporary use of a steam thresher did increase the risk was properly left to the jury.

*Diehl vs. Adams Co. Mut. Ins. Co.*, 8 P. F. Smith, 443.

*Long vs. Beeber.*

*Rep'd Jour'l*, p. 632.

PA. S. C.

## VALUATION.

§ 135. FIRE.—*Effect of Excessive through Mistake.*—In order to work a forfeiture of the right of recovery, the overvaluation in an insurance policy must be a clear one, but it is not necessary that it be intentional and fraudulent to vitiate the policy. The effect is the same if done by mistake, and overvaluation of the agent is imputable to the principal.

*Mitchell vs. Zimmerman*, 4 Texas, 73; *Henderson vs. R. R. Co.*, 17 Texas, 560.

*Home Ins. Co. vs. Eakin.*

*Rep'd Jour'l*, p. 560.

TEXAS C. A.

## VALUATION.

§ 136. FIRE.—*Statements in Application.*—The strict accuracy required in applications for insurance, in order to bind the insurer, is in the statement of facts, and not matters of opinion as to the value of the property, unless intended to obtain some unfair advantage.

Jeffries vs. Life Insurance Co., 22 Wall., 47; Ætna Life Ins. Co. vs. France, 91 U. S., 510; Bobbitt vs. L. & L. & G. Ins. Co., 76 N. C., 70.

Dupres vs. Virginia Home Ins. Co.

—§§ 128, 131.

## WATCHMAN.

§ 137. FIRE.—*What is not Sufficient Compliance with the Policy.*—A provision in a policy of fire insurance requiring the assured to employ a watchman to be in and upon the premises, day and night, during such time as the insured works were idle, is not complied with if such watchman, during the night, slept in a building located across the road from the insured premises, and about one hundred feet distant therefrom. Such result follows, although the watchman kept a watch-dog in the insured building, which had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached. In a complaint on such policy an allegation that a watchman was employed by the plaintiff in and upon the premises day and night, and was upon the premises at the time of the fire, is sufficiently denied by an answer, which denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire, and for more than two hours prior thereto, no watchman was in and upon the premises.

Trojan Mining Company vs. Firemen's Ins. Co.

Rep'd Jour'l, p. 625.

CAL. S. C.

## WIFE'S POLICY.

§ 138. LIFE.—*Title in case of Divorce.—Effect of Mistake.*—A took out a policy on his wife's life, payable in four years to her if living, and if not living to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce. A statute provided, "Any policy or policies

of insurance or part thereof which shall not exceed in the aggregate the sum of ten thousand dollars, made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband, and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person." *Held*, That the wife was entitled to the amount due on the policy at its maturity.

*Landrum vs. Knowles*, 22 N. J. Eq., 594; *Ricker vs. Charter Oak Life Ins. Co.*, 27 Minn., 193, 195; *Fowler vs. Butterly*, 78 N. Y., 68; *Pilcher vs. N. Y. Life Ins. Co.*, 33 La. An., 322, 330.

The husband claimed that he had taken the policy out for his own benefit, and supposed it was payable to himself. *Held*, That there is ordinarily no remedy for such a mistake if the other parties be not to blame, and here no circumstances are alleged to take that case out of the ordinary rule.

*Blackburn's Case*, 8 DeG. M. & G., 177; *Rashdall vs. Ford*, L. R., 2 Eq., 750; *Farley vs. Bryant*, 32 Me., 474, 483; *Dill vs. Shahan*, 25 Ala., 694; *Lanning vs. Carpenter*, 48 N. Y., 408; *Nelson vs. Davis*, 40 Ind., 366; *Gerald vs. Elley*, 45 Iowa, 222; *Story's Eq. Juris.*, §§ 113, 116, 137; *Kerr on Fraud and Mistake*, 409, 428.

*Etna Life Ins. Co. vs. Mason.*

*Rep'd Jour'l.* p. 572.

R. I. S. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

From certified transcripts in our possession.

## COURT OF APPEALS OF TEXAS.

Error from Lamar County.

HOME INSURANCE COMPANY }

v. }

R. E. EAKIN.\* }

In order to work a forfeiture of the right of recovery, the overvaluation in an insurance policy must be a clear one, but it is not necessary that it be intentional and fraudulent to vitiate the policy. The effect is the same if done by mistake, and overvaluation of the agent is imputable to the principal.

DUDLEY and McDONALD, for Plaintiff in error.

HALE and BALDWIN, for Defendant in error.

HURT, J.

This suit was instituted in the county court of Lamar County by the defendant in error, upon a policy of insurance issued by the plaintiff in error, by the terms of which it insured the defendant in

\* From Texas Law Review.

error against loss or damage by fire not to exceed the amount of \$750, on a certain frame dwelling described in said policy. The petition alleged the total loss of the building by fire, and claimed damages for the full amount insured.

The defense set up, *inter alia*, was that the insurance upon the property was procured by fraud; that the plaintiff, at the time he applied for the insurance, represented to the agent of the company that the building insured was worth \$1,000, which representation was false, and was fraudulently made by plaintiff in order to obtain a greater amount of insurance on said property; that at the time the property and its value was unknown to the company or its agent; that the representations of plaintiff were relied and acted upon by the defendant company; that the overvaluation was gross; that the building, at the time it was insured as well as at the time it was burned, was not worth more than \$400.

Upon the trial there was a very great conflict in the evidence as to the value of the property destroyed. Plaintiff in error, in its fourth assignment of error, complains of the charge of the court relative to this matter, which charge is as follows: "I charge you, therefore, in this connection, that the overvaluation (if any) of the house, to avoid the policy, must have been a gross and clear overvaluation, or such as must be presumed to have been known by defendant and fraudulently and intentionally made by him; hence, although you may believe from the evidence that the defendant did overvalue the house, if you further believe from the evidence that such overvaluation was not fraudulently and intentionally made by plaintiff, \* \* \* you will find for plaintiff.

Now, if the overvaluation of the house was so clear and gross as to be presumed to have been known and intended by the plaintiff and by him fraudulently made, evidently there is no room for an honest error on the part of the plaintiff. If to avoid a policy the overvaluation must have been made knowingly, intentionally, and fraudulently, and that the same was clearly and grossly such, then the charge is correct, otherwise it is not. What, then, is the law governing this question?

Mr. May, in his work on insurance, says: "But the law will not here interest itself in trifling discrepancies and insignificant differences such as may be readily accounted for by that natural tendency which self-interest always engenders. The overvaluation, in order to work a forfeiture of the right of recovery, must be a clear one—so clear that it is obvious at a glance, and cannot be

accounted for upon the principle that every man is naturally inclined to put a favorable estimate upon his own. It is not necessary that the overvaluation be intentional and fraudulent to have the effect of vitiating the policy. The effect is the same if it be done by mistake, and overvaluation by the agent is imputable to the principal." [May on Insurance (2 ed.), sec. 373.]

And in *Mitchell vs. Zimmerman* (4 Texas, 79), Judge Wheeler says: "But, whether the party thus misrepresenting the facts knew them to be false, is wholly immaterial, for it has been justly said the affirmation of what one does not justly know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false." [Citing 1 Story's Equity, sec. 193; 9 Vesey, 21; see also *Henderson vs. R. R. Co.*, 17 Texas, 560.]

In this connection notice must be taken that in the charge of the court as above quoted from the transcript, the word defendant is used instead of plaintiff. It is not necessary for us to indicate whether or not this fact would authorize a reversal of the judgment, since it is not likely to occur on another trial.

For the error in the charge of the court above indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.



## SUPREME COURT OF RHODE ISLAND.

ÆTNA LIFE INS. CO.

vs.

VOLNEY W. MASON ET UX.\*

A took out a policy on his wife's life, payable in four years to her if living, and if not living to himself. He paid the premiums, retained the policy, and received payments made upon it. She was living at the maturity of the policy, but had filed a petition for divorce.

A statute provided "Any policy or policies of insurance or part thereof which shall not exceed in the aggregate the sum of ten thousand dollars, made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person."

*Held*, That the wife was entitled to the amount due on the policy at its maturity.

LOUIS L. ANGELL, *for Complainant and Respondent*, the trustee of Annie M. Mason.

JAMES C. COLLINS, *for Respondent* Volney W. Mason.

DURFEE, C. J.

It appears in this case that on October 31, 1879, the plaintiff company issued its policy numbered 32,951, on the life of Annie M. Mason, wife of Volney W. Mason, payable by its terms to said Annie, on October 31, 1883, if then living, and, if dead, to said Volney; that the said Annie is still living, and that on October 31, 1883, the policy

\* Decision rendered, December 27, 1884.

matured and the sum of \$517.57 became payable on it. It further appears that meanwhile the said Annie has filed petition for divorce from said Volney, that he has the policy, and that both he and she claim the amount due on it. In these circumstances, the plaintiff company has filed a bill of interpleader, and, under a decree of the court, has paid the amount into the registry of the court, and the said Annie by her trustee, duly appointed, and the said Volney have interpleaded in regard to it. The said Volney avers that without consulting said Annie he procured the policy for his own purposes, paying all that has been paid by way of premiums or otherwise, and that said Annie never expressed or intimated any desire in regard to it. He also avers that the policy was never given to said Annie, and was never in her possession, but was always kept by him; that the policy was originally for \$2,500; that payments have been made from time to time, and always to himself, until the sum of \$517.57 is all that remains due thereon; that said Annie never objected nor made any claim to said previous payments; that he has always supposed that the policy was payable according to its terms to him, except in case of his death, being payable in that case only to said Annie, and that he procured the policy for his own benefit and not for the benefit of any other person, except in the case of his decease before it should fall due. As the case is presented, we are asked to decide whether these averments, supposing them to be true, make a case which entitles the said Volney to said \$517.57.

Our statute, Pub. Stat. R. I. cap. 166, § 21, provides as follows, to wit:—

“Any policy or policies of insurance or part thereof, which shall not exceed in the aggregate the sum of ten thousand dollars made by an insurance company on the life of any person and expressed to be for the benefit of a married woman, whether effected by herself or by her husband, or by any other person on her behalf, shall inure to her separate use and benefit, independently of her husband and of his creditors and representatives, and also independently of any other person effecting the same on her behalf, his creditors and representatives, and such policy may be sued in the name of the person beneficially interested therein, or in the name of the representative of such person.”

We think it is quite clear that under this provision, in the absence of any fraud or mistake, the policy must be taken to have inured to the benefit of the said Annie according to its terms, notwithstanding that it was never delivered to her, but was retained by her husband and was payable to him in case of her death before the time for payment. Hers was the primary right, he having no right if she sur-

vived the time for payment. Having survived, her right has become absolute. Indeed, the cases go far to show that this would have been the effect without the statute: *Landrum vs. Knowles*, 22 N. J. Eq., 594; *Ricker vs. Charter Oak Life Ins. Co.*, 27 Minn., 193, 195; *Fowler vs. Butterly*, 78 N. Y., 68; *Pilcher vs. N. Y. Life Ins. Co.*, 33 La. An., 322, 330. But even if, without the statute, it would be possible for said Volney, he having paid for the policy, to prove a resulting trust in his favor against its terms by oral testimony, we think it would not be permissible under the statute, the statute being so positive and explicit. Any other construction would make the statute a cover for fraud.

Does the answer of said Volney show a case of fraud or mistake? There is clearly no fraud alleged. We do not think the answer shows a case for relief on the ground of mistake. It does not allege that the policy differs in its terms from what the parties intended. It simply alleges that said Volney supposed it was payable to him according to its terms, and not to his wife, unless he died before it became payable. We do not see how he could possibly have supposed so, for he does not allege any ignorance of the terms, but if he did suppose so, he supposed so because he misunderstood the legal effect of plain and unambiguous words. There is ordinarily no remedy for such a mistake if the other parties be not to blame, and here no circumstances are alleged to take that case out of the ordinary rule: *Blackburn's Case*, 8 DeG. M. & G., 177; *Rashdall vs. Ford*, L. R. 2 Eq., 750; *Farley vs. Bryant*, 32 Me., 474, 483; *Dill vs. Shahan*, 25 Ala., 694; *Lanning vs. Carpenter*, 48 N. Y., 408; *Nelson vs. Davis*, 40 Ind., 366; *Gerald vs. Elley*, 45 Iowa, 222; *Story's Eq. Juris.*, §§ 113, 116, 137; *Kerr on Fraud and Mistake*, 409, 428.

Our conclusion is that Annie M. Mason is entitled to the money in the registry of the court, and that a decree should be entered ordering its payment to her.

Decree accordingly.

## SUPREME COURT OF LOUISIANA.

*Appeal from the Civil District Court for the Parish of Orleans.*

ALLEN, WEST &amp; BUSH, )

vs. }

SUN MUTUAL INS. CO. )

Where the building insured was erected by the lessees, with an agreement on the part of the lessor to buy at the termination of the lease, the lessees had an insurable interest, and were entitled to recover for the loss.

MANNING, J.

This suit is upon a policy of insurance for eighteen hundred dollars, the value of a gin-house, cotton press, gin stand, engine, shafting and belting destroyed by fire. The value of the engine and boilers, \$450, was eliminated from the demand on trial below, and it must submit to a further reduction because of the three-quarter country clause.

The defense is a denial of ownership or any insurable interest in the insured, and nullity of the policy by reason of the failure to disclose the nature of his interest.

The plaintiffs are a firm of New Orleans factors of S. & T. L. Morrow, a planting firm of Tensas. The gin-house, etc., is on the Tensas plantation which was cultivated by the Morrows, and was insured by the plaintiffs for account of the planting firm.

The Morrows were cultivating the plantation under a lease. They built the gin-house and their lessors were to buy it of them at a price to be agreed on at the termination of the lease. The fire occurred pending the lease.

There is testimony of a modification of this agreement, and of the impressions of the lessors of how the ownership stood or was to stand, and arguments thereon that if so and so was the agreement, then the ownership was in this or that one, but both the Morrows state the agreement was substantially as above, and they had the best means of knowing what it was.

Upon the ascertainment of this fact, the defense collapses. They had an insurable interest and had truthfully disclosed it.

It is therefore ordered and decreed that the judgment of the lower court is reversed, and that the plaintiffs now have judgment against the defendant for one thousand and twelve, 50-100 dollars, with legal interest from judicial demand, and for costs of both courts.

Rehearing refused.

## SUPREME COURT OF NORTH CAROLINA.

FEBRUARY TERM, 1885.

SARAH A. DUPREE

vs.

VIRGINIA HOME INS. CO.)

The granting or refusing a continuance is entirely discretionary with the presiding judge, and cannot be assigned for error on appeal.

In an action on a policy of insurance, where the defense is overvaluation, it is competent for the plaintiff to prove that insurance was effected the year previous on the same property in another company, through the same general agents by whom the policy in suit was issued, and that before the former policy was issued an agent examined and valued the property, although such agent was not the agent of the defendant company. Such evidence is admissible, not on the ground of binding the defendant with the knowledge acquired by such agent, but to show what information the general agents were in possession of when they issued the policy in suit.

The court may permit a paper to be read in evidence before its execution has been proved, when the party introducing it undertakes, at a subsequent time, to prove the execution.

Where concurrent insurance is effected in different companies, all represented by the same general agent, an examination and valuation made by a subordinate agent of one of the insurers, is admissible in evidence against all who act on his report, and the same rule applies to successive insurance in different companies.

The admission of immaterial evidence cannot be assigned as error.

A party's reason for peremptorily challenging a juror cannot be inquired into. The law gives to a litigant the right to object to a limited number of jurors without assigning any cause.

It is incompetent to prove what a witness swore on a former trial, when the witness can, himself, be put on the stand.

Where a witness has been questioned in regard to certain matters in his examination in chief, it is discretionary with the judge whether he will allow further questions to be asked the witness in regard thereto, after the cross-examination has been completed.

Refusal to allow further testimony after the case has been closed, is matter of discretion and not subject to review.

Issues which embrace all the substantial matters of defense developed in the pleading and necessary to a determination of the action, are sufficient.

When requested to do so in apt time, the judge must put in writing so much of his charge as embodies principles of law, but he cannot be forced to put the recapitulation of the evidence in writing.

It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury.

The strict accuracy required in applications for insurance, in order to bind the insurer, is in the statement of facts, and not matters of opinion as to the value of the property, unless intended to obtain some unfair advantage.

Messrs. ARMISTEAD JONES and A. M. LEWIS & SON, *for Plaintiff.*

Messrs. D. G. FOWLE, J. W. HINSDALE, and JOHN DEVEREUX, JR., *for Defendant.*

SMITH, C. J.

The plaintiff's action is upon a policy of insurance against fire, issued by the defendant company on the 3d day of October, 1879, and its object the recovery of damages for the loss of a storehouse and certain articles of personal property therein, that were burned on the 21st day of the same month. Besides controverting some of the allegations contained in the complaint, the answer sets up as a defense against the demand false representations, alleged to have been made in the plaintiff's application for insurance, as to the value of the property proposed to be insured, and her failure, after the fire, to furnish, under oath, to the adjusting officer of the company sent to make examination, the full and detailed specifications of the building, its cost, and the other particulars required under the terms of the contract. The defendant avers that the house and other articles are knowingly estimated by the plaintiff at double their real value, as grouped in her application, at the time; and these false and fraudulent estimates, as an inducing influence, enter into and vitiate the contract of insurance, and exonerate the company from any liability under it.

The aggregate valuation distributed among the several kinds of property is put in the application at \$1,700, whereof the sum of \$1,132, not quite two-thirds, also ratably apportioned, is protected by the policy issued in response. Some discrepancy appears in the enumeration of the several sums covered by the policy, which, added, make \$1,066 and not the entire amount of the insurance. But the variance was not adverted to in the argument, nor does it affect the merits of the controversy, and we notice it only to show that it has

not been overlooked in examining the record. The parties accept the first-mentioned sum as that in dispute, and this is assumed in the verdict for damages.

From the conflicting allegations made in the pleadings, issues in the form of inquiries are drawn out and were submitted to the jury, which, with the responses to each, in substance are as follows :—

1. Did the defendant company issue the policy mentioned in the complaint? Answer. Yes.

2. Was the property covered by it destroyed by fire? Answer. Yes.

3. What was its first cost? Answer. \$1,700.

4. What was the value of the house and other insured property at the time of application for insurance, separately estimated? Answer. Value of the house, \$800; general merchandise, \$600; counter, shelves, etc., in the house, \$100; show cases, scales, drawers, and furniture, \$100.

5. What the value when destroyed by fire? In answer the jury make the same estimates, except that the general merchandise is valued at \$750, an excess of \$150 over the former.

6. Did the plaintiff know or have any reason to believe that the property or any part of it was overvalued in her application? Answer. No.

7. What was the value of the property destroyed by the fire? Answer. \$1,750.

8. Did the plaintiff furnish proof of loss in compliance with the conditions of the policy? Answer. Yes.

9. Had a storehouse located on the same land, and near the same site, been burned within three years next before the plaintiff's application? Answer. Yes.

10. If so, and it was insured, by what company and for whose benefit was the insurance effected? Answer. By the Virginia Fire and Marine Insurance Company, and for the benefit of W. E. Dupree.



In pursuance of these findings judgment was rendered for the plaintiff, and the defendant appealed.

The exceptions, thirty-six in number, to which is added another in the brief for the appellant, not found in the record, were taken during the various stages of the trial up to the final judgment to rulings of the judge in the reception of evidence objected to—in the rejection of evidence offered by the appellant—in the framing of issues—in the refusal to give instructions asked—in the giving of such as are shown in the charge, and in other matters appearing in the transcript. These exceptions will be considered seriatim in the order of their enumeration.

(1.) The defendant's counsel moved for a continuance on account of the absence of a witness, the grounds for which were deemed insufficient by the court, and for this reason as also in the exercise of a judicial discretion the motion was denied. If repeated and uniform rulings that the granting or refusing a continuance of a cause is not a subject of appellate review are to have any force, this must be considered as settled. *State vs. Scott*, 80 N. C., 365.

(2.) The second exception is to the admission of proof of an application made by the plaintiff the preceding year to the Virginia Fire and Marine Insurance Company, through the same general agency of Cameron, Hay & Co., by whom the present insurance was effected upon the same substantial statement of facts in the application as far as pertinent to the controversy, her notification by these agents of the approaching termination of the time of insurance, and renewal solicited, her being supplied by them with a form of application to the defendant company, filled up, returned, and policy issued, and that the first application was filled up, and the responses made out under the supervision of an agent of that company, sent to make a personal examination of the premises, preparatory to the issue of its policy. We do not see any valid objection to the proof of these facts. It was not offered to connect the defendant with the agent, so that from the relation, the knowledge acquired by the latter is in law to be deemed the knowledge of the principal, and thus preclude the defendant from impeaching the plaintiff's valuations as false and fraudulent, but to show upon what information in possession of Cameron, Hay & Co., the policy involved in this suit was issued and why no further inquiry was considered necessary. An examination which warranted the first, might well be considered, in the absence

of any suggested change in the condition or value of the property, sufficient to authorize the issue of the last.

Moreover, the plaintiff sought a reinsurance in the same company, and the substitution of the defendant was the unasked act of the general agency under an authority conferred and used at the discretion of the agency, and in which the plaintiff, indifferent in the matter, acquiesced. She ought not, therefore, to be placed in a less favorable position than she would be if the same company had reinsured.

The general agents did not, therefore, exclusively rely upon the plaintiff's estimates, but were in possession also of the information supplied by the personal inspection of the agent of the former company, when they chose to transfer the application to the defendant, and both are in harmony with the plaintiff's statement in the present case.

The material and important question then and now is, was there an intentional overvaluation, not a mere error in judgment, if the estimates were put too high, and this is solved by a verdict which declares that the property was respectively worth the sums at which it is valued in the application, and that consequently there was no misrepresentation, fraudulent or otherwise, in the application.

(3 and 4.) The production of the notice and the letter with the former and the present policies, finds support in the same consideration. In the notice, Cameron, Hay & Co. call themselves "General Insurance Agents," and in neither do they designate their principals. The objection to the reading of these papers until their authenticity was shown and the admission of them on condition of proof thereafter, was removed by subsequent evidence of their genuineness.

(5.) The objection to the testimony that, upon the plaintiff's first application to Cameron, Hay & Co., an agent came out and saw and valued the property, pursuant to which the former policy issued, and that they had the same information when the defendant, through the same agents, entered into its contract with the insured, is met with the same answer given to a similar preceding one, and is equally untenable.

It is certainly competent to show the source and extent of the information possessed by the general agents, and which prompted their action in the premises, and to repel the imputation of a false and fraudulent representation of value on the part of the plaintiff.

It is manifest that if a divided insurance had been obtained in different companies, all represented by the same agency upon an examination and estimate made by a subordinate agent of one of them, he would stand in the same relation to each and be, to this extent, the common agent of all who act upon his report. Why should not the same rule prevail when successive insurances in different companies are secured? The testimony was properly admitted.

(6 to 11) inclusive, and 16 and 17 exceptions, relate to evidence offered to identify the person of the agent, by proof of his handwriting in the application, and that while he was in the service of the former, he was not in the employ of the present insuring company, may be considered together as presenting the same general proposition in varying aspects. While there is no sufficient reason, intrinsic in the evidence itself, for its exclusion from the jury, it is obviously immaterial, so that no error can be assigned in the ruling. It is unimportant that the person that made the examination of the property and concurred in the estimate of its value, was acting at the time for the former company, for the information was communicated to the firm that issued both policies, and had authority from each to do so. From whatever source derived, the general agents had the same knowledge, and it is their possession of the information which in law is imputed to their principals and imposes the obligation.

(12.) The inquiry as to the plaintiff's reason for the peremptory challenge of a juror, with a suggestion of its being because the juror resided in her neighborhood, was rightfully disallowed. The law gives to a litigant the right to object to a limited number of tendered jurors without assigning cause, and its exercise cannot be called in question to his prejudice in the mode here attempted. This, if any authority were needed, is decided in *Capehart vs. Stewart*, 80 N. C., 101.

(13, 14, 15.) These exceptions having been abandoned, we forbear to comment upon them.

(14.) The offer to prove that a witness who had not been introduced at the present trial swore, on his former examination, as to the value of the insured property, was promptly and properly denied. The correctness of this ruling is too obvious to require more than a reference to *Gadsby vs. Dyer*, decided at last term, 91 N. C., 311, and what is said in the opinion filed in that case.

(18, 20.) These exception involve a question of practice, and the testimony was not received because not offered in apt time. The defendant proposed to inquire of its witness, J. A. Rhodes, after the conclusion of the cross-examination by the plaintiff, whether his estimate of the cost of such a structure as that burned (which he had put at \$350 on his first examination) was based upon his knowledge or was "mere guess-work," as he had said in his cross-examination by the plaintiff. The answer would have been but a repetition of the testimony in chief with the explanation given in response to the plaintiff's inquiry into the value of the opinion, as embodied in the estimate, and thus the same subject-matter would again come up. It was entirely competent for the judge, while in his discretion to admit, to avert the proposed re-examination for the reason which he assigns.

The other exception is to the refusal of the court, after the witnesses on both sides had been heard and the plaintiff's testimony in reply was closed, to permit the defendant to introduce evidence to contradict the statement of P. C. Dupree, that he had on the other trial contradicted the deceased witness. The statement was elicited upon his examination by the defendant and not in answer to any interrogatory from the plaintiff. The testimony was disallowed as re-opening the case after it was closed, for no sufficient reasons addressed to the discretion of the court to warrant a relaxation of the rule. The refusal presents no point for review upon appeal, and the practice is clearly and distinctly marked in the well-considered opinion of the court in *Sawyer vs. Wood*, Phil., 251, 274, delivered by Mr. Justice Reade.

(19.) The testimony of a witness for the defendant, who had been examined at the previous trial and had since died, one J. W. Dodd, was reproduced by one who had heard his former statement, that a conversation occurred between the plaintiff and her brother, the said P. C. Dupree, in which the former said the house had cost her nearly \$400, and that some small addition of lumber afterwards had run it up \$10 or \$15 more.

The said Dupree, for the plaintiff, denied that any such conversation occurred, or that he had ever heard the plaintiff say how much money she had expended on the building.

Upon cross-examination the witness admitted, that as to this, the testimony of the deceased witness was in conflict with his own, and thereupon he was asked, with a view of impeaching him, whether he

knew the handwriting in the body of the application and the signature thereto.

We are unable to see in the question, or the answer it may bring out, any tendency to impeach the truthfulness of the witness himself, or to impair the force of his testimony. At least this is not sufficiently pointed out in the record to show its pertinency and bearing in that direction, and the error in not permitting the inquiry to be made. How can the witness' knowledge, or want of knowledge, of the writing disprove what the witness says in regard to the conversation, or what his sister said at any other time in his hearing?

The discrediting interrogations that put the witness in antagonism to the reproduced testimony of Dodd, and which antagonism he admits, seem to be directed, not to the written answers found in the application, but to the plaintiff's verbal declarations and especially that spoken of by the deceased witness.

The exception must be overruled.

The series of issues, ten in number, while the subject of complaint in the eleventh exception taken by the appellant, in our opinion present the controversy in all its essential aspects to the minds of the jury, whose findings negative all the forms of defense set up to the plaintiff's claim.

These findings determine the separate values of the house and articles therein as grouped in the estimates, at the time of the fire, their original cost as a whole, the absence of knowledge of, or of intended, overvaluation in the plaintiff's application, the measure of her loss from the fire, a full compliance with the requirements of the policy in furnishing proof of the loss, and that the plaintiff had no interest in a previous insurance of a house upon the same premises by W. E. Dupree.

Without considering separately the exceptions that relate to the form of the issues framed and passed on by the jury under the sanction of the court, it is sufficient to say that these embrace all the substantial matters of defense developed in the pleadings and necessary in the determination of the action, on which the defendant was entitled to a response from the jury, comprehended in the general terms of an inquiry, while, in some cases, not subdivided and presented in the specific form tendered for the defendant.

We therefore overrule these exceptions.

We now proceed to consider the defendant's prayer for instructions and those given by the court.

The defendant's counsel requested that the jury be charged:—

1. That the application upon which the policy of insurance was issued forms a part of the contract of insurance and is a warranty by the assured.

2. That the application, being in the nature of a condition precedent, the burden of proof is upon the plaintiff to prove the truth of its representations.

3. That a representation as to the value of the property insured is material.

4. That the doctrine of immateriality does not apply in the case where the representation forms a part of the contract, and is made in response to a direct question.

5. That it is sufficient to avoid the policy, that the representations were false, however honestly made.

6. That the burden of proof is upon the plaintiff to satisfy the jury that the property insured was as to each item worth the value placed upon it.

7. That there is no evidence that any agent of the Virginia Home Insurance Company ever inspected or valued the building or shelves, counters, or drawers insured.

8. That there is no evidence that any agent of the Virginia Home Insurance Company ever inspected or valued the stock of goods, show-case, scales, and bedroom furniture insured.

9. That there is no evidence that any agent of Cameron, Hay & Co. ever inspected or valued the property insured or any part thereof.

10. That there is no evidence that the Virginia Home Insurance Company, or any of its agents, had any personal knowledge of the value of the property insured.

11. That if the jury shall believe that a former agent of Cameron Hay & Co., acting for the Virginia Fire and Marine Insurance Company, examined and valued the building, shelves, counters, and drawers insured, there is no evidence that he communicated his knowledge to Cameron, Hay & Co.; and the Virginia Home Insurance Company are not in any way affected by said knowledge of Cameron, Hay & Co., not communicated to them.

12. That there is no evidence that in any way fixes on the defendant either actual or constructive knowledge of the value of the property insured, outside of the application on which the policy was based.

13. That it is incumbent on the plaintiff to satisfy the jury, by a preponderance of evidence, that the cost price of the property insured to the plaintiff was \$1,700.

14. That there is no evidence that the property insured cost her \$1,700, and that the jury must find upon the issue upon this subject in favor of the defendant, that is, that the property did not cost \$1,700.

15. That if the jury shall believe, as testified by the plaintiff, that her son, by her permission, built a house upon her land, which was, a year or two before the date of the policy sued upon, destroyed by fire, that they must find the 9th issue in favor of the defendant.

16. That the burden of proof is upon the plaintiff to show that she has furnished to the company the proof of loss required by the policy, containing a particular account of such loss signed and sworn to by her.

17. That there is no evidence that she has furnished the defendant with the required proof of loss as to the general merchandise.

18. That there is no evidence that the plaintiff has furnished the defendant with the required proofs of loss for the scales, drawers, and bedroom furniture.

19. That there is no evidence that the defendant has waived such proof of loss.

20. That if the jury shall believe that the plaintiff furnished to the defendant the proof of loss which was sworn to before S. D. Williams and procured him to sign the certificate of such loss, without knowing the amount of the loss, the value of the property, or other facts set forth in the certificate made by said Williams, or without having examined and read over the same before signing it; that said proof of loss was fraudulent and not such as required by the policy, and the jury must find these issues in favor of the defendant.

21. That the defendant was not bound to make an examination of the value of the property insured, and was in no default for not doing so.

22. That the defendant had a right to rely on the statements of the assured, as contained in her application, and was not bound to make any further inquiry as to any of the matters contained in said application.

23. That the plaintiff had a right to read Borum's deposition to the jury. The omission of the defendant to read the deposition which might equally have been read by the plaintiff, is no ground for the presumption that the testimony of Borum would be unfavorable to the defendant.

24. That the jury cannot consider any of the evidence relating to the examination of the property insured, by an agent for the purpose of insurance prior to the date of this policy, as such evidence has no bearing in this case, and is withdrawn from the consideration of the jury.

25. That when application is made for insurance, at the same time and in the same application, upon two or more separate pieces of property, as upon the store and the goods therein; and the statements of the insured, contained in the said application, in reference to any one item of property are false, the contract is regarded as entire, and the whole contract is void.

Counsel for the defendant in addition to the request made in writing that the charge of the court should be in writing, asked the court when the last of five speeches was being made to the jury, to put in writing, also, any recapitulation of the testimony given to the jury, to show the application of the law to the testimony.

His honor charged the jury, in writing, as follows:—

“The plaintiff brings her action to recover upon a contract between the plaintiff and the defendant company, which contract is embodied in the application and policy issued thereon. The contract is mutual.

The answers of the plaintiff contained in the application amount to a covenant on the part of the plaintiff that such answers (if material), being inducements to the defendant to enter into the contract, were true when the application was made. The defendant covenants to perform the stipulations contained in the policy, subject to the conditions set forth in the policy, but is not answerable to plaintiff in damages, unless the plaintiff has shown affirmatively that all the material representations contained in the applica-



tion, and relied upon as inducements to contract by defendant, were true when made.

The burden is upon the plaintiff to satisfy the jury by a preponderance of testimony:—

1. That the defendant executed and issued to the plaintiff the policy set forth in the complaint. If the jury are so satisfied their response to the first issue will be “Yes,” otherwise, “No.”

2. That the plaintiff's property covered by the policy sued on was destroyed by fire. If the jury are so satisfied they will respond to the second issue, “Yes,” otherwise, “No.”

3. What was the actual or estimated cost of the property insured, and that it was as great as the amount set forth in the application, viz., \$1,700. If the actual or estimated cost of the property was less than \$1,700, then the plaintiff cannot recover. In response to the third issue, the jury will write in letters or figures what they find from the testimony was the cost of the property insured.

4. That on October 3, 1879, when the application was made \* \* \* when storehouse was destroyed by fire, the value of each of the articles or items set forth in the application or policy was as great as the value fixed in the application and policy, viz.: That on the first of said days the storehouse was worth \$800; the general merchandise was worth \$700; the counters, shelves, etc., in storehouse were worth \$100; the show-case, scales, drawers, and bedroom furniture in the storehouse were worth \$100.

In response to both of said issues the jury will write in letters or figures what they find from the testimony was the reasonable market value of articles as classified and set forth in the issues submitted. Upon the question as to the value of the property insured, at the time when the application was made and also when the storehouse was destroyed by fire, the plaintiff relies upon her own testimony that the merchandise was worth according to inventory at cash price on September 29, 1879, \$600, and that \$200 worth of goods were added; that the other insured articles in the store were worth the amounts set forth in the application, viz.: ..... and .....; that the storehouse was worth \$800, and also upon the testimony of P. C. Dupree, who testified that as carpenter he did a portion of the work.

The defendants rely upon the testimony of the witnesses Ashley and Ellington, examined as experts, and a number of other witnesses

who estimate the value of the building at \$350 to \$400, and the shelves, counters, and show-case at less than the value set forth in the policy, and upon the testimony of a number of witnesses, who estimate the value of the goods much lower than price fixed in the policy.

In determining the value of the property insured on October 3, 1879, the jury may consider and give such weight as they deem proper to the testimony offered to show that the firm of Cameron, Hay & Co. were, during the years 1878 and 1879, agents both of the defendant company and the Virginia Fire & Marine Insurance Company, that issued the policy offered in evidence in July, 1878, and that an agent acting under the direction of said firm, inspected and estimated the value of the storehouse and other articles insured in the policy sued on, at the prices set forth in the policy issued in 1879, and made out the application; that the relations of said firm with said agent were such that the said firm of Cameron, Hay & Co. could issue a policy in the name of either of the corporations without regard to the form of the application, and that the policy sued on was issued upon an application in form for insurance in said Virginia Fire & Marine Insurance Company. The witness may be considered as determining the value of the other articles insured, but not as to the value of the merchandise.

The burden is upon the plaintiff also to show in response to the seventh issue, what was the value of the property actually destroyed by fire.

The plaintiff insists that it was the amount set forth in the policy, less the value of the articles carried out of the storehouse and saved. The defendant insists that the aggregate value of the articles was much smaller, and that the value of the articles saved should be deducted from the aggregate value ascertained by the jury.

The response to the sixth and ninth issues will be "yes" or "no," as the jury may find from the testimony.

In response to the tenth issue, if they shall find that the house had been previously insured, the jury will give the name of the person for whose benefit the storehouse was insured. The only testimony on this subject was that of the plaintiff, that her son built the storehouse on her land and by her permission, and afterwards took out a policy of insurance for his own benefit, and that the name of her son was W. E. Dupree.

In passing upon the eighth issue, if the jury are satisfied by a preponderance of testimony, that the plaintiff furnished to the defend-

ant the proof of loss, which has been offered in evidence, within ninety days after the property insured was destroyed by fire, then the burden would be upon the defendant to show that the defendant demanded other proofs or in different form, and which were requisite to full compliance with conditions of the policy. If such demands were made by defendant, and the plaintiff did everything in her power to comply with the demand, and failed only to furnish some of her bills or her inventory destroyed by fire, the proof of loss offered in evidence would be deemed in law a compliance with the stipulations and conditions of the policy.

The court gave the first three and the twenty-first instructions asked by defendant, and stated that as the jury were called upon to find the facts so fully as to amount almost to a special verdict, much of the instruction asked by the defendant involved questions of law which might arise after the return of the verdict.

In their deliberations as to the sixth issue, the jury may consider the testimony of the witness as to actual value of the property insured when the application was made, and also the testimony in reference to the inspection of the property by an agent in 1878, to which attention was called in connection with the fourth issue.

32d Exception.—The defendant excepted to his honor's charge as given.

33d Exception.—The defendant also excepted to the failure and refusal of his honor to give each of the instructions asked for.

At the conclusion of the evidence and before the argument was entered upon, the defendant's counsel presented a series of instructions, twenty-five in number, which the court was requested to give to the jury, and at the same time demanded that the instructions to be given should be in writing, adding thereto during the progress of the discussion, a request that the recapitulation which might be made of the testimony, should also be reduced to writing, to show the application of the law to it.

In this connection it may be remarked that the statute, code, §414, only requires to be written and read to the jury, when demanded in apt time, so much of the charge as embodies a proposition or principle of law, which, if erroneous, admits of correction, but not the rehearsal of the testimony. He must "state in a plain and correct manner the evidence given in," and then, if required, "declare and explain the law arising thereon" in writing; section 413.

This construction is put upon the statute and declared in *Currie vs. Clark*, 91 N. C., 355, 359, 360.

The three first enumerated instructions, as also the 21st in the series offered by the defendant, were given, and these are put out of controversy.

The next two, numbered four and five, present questions of law and not of fact, and came within the observation of the judge as matters to be decided after the findings of the fact to which the principle of law may be applicable; moreover, all the misrepresentations relied on in the answer, as a discharge of the defendant from the obligations of the contract, consist in an alleged overvaluation of the property, in the denial that the plaintiff had before suffered a loss by fire, of a building upon the same premises, and added to this, her failure to furnish the particulars of the loss afterwards, when required. These defenses are presented in distinct and independent issues to the jury, with directions to determine the separate value of each kind of insured property, at the time of insurance, and in like manner the actual or estimated cost of the property in the aggregate. This was done, and the verdict also fixed the separate value at the time of the fire. As the findings are adverse to the defendant, and sustain statements in the answer, no question as to their materiality can arise, and no cause of complaint found in the imputed omission to tell the jury that, in order to a recovery, all the answers to inquiries contained in the application must be true in fact, irrespective of their materiality in inducing the issue of the policy.

The next seven instructions, from six to twelve inclusive, are predicated upon matters already considered, and require no further comment, except that which imposes the burden of showing the separate values upon the plaintiff, and in this the jury were so directed, and they have so responded.

The 13th instruction asked, differs from that given and numbered three, only in that the form confines the inquiry to the aggregate cost of the property, while the other, following more nearly the words of the application, requires in detail the finding of "the actual or estimated cost."

There can be no just complaint of this.

The 14th instruction follows and is dependent upon that immediately preceding, and the case shows there was evidence to warrant the response to the direction to find, if not the actual, the estimated cost of the property, and in this alternative form, the answer is given to the inquiry in the application.

The 15th instruction was properly refused, and verdict removes the defense set up in the answer, based upon an alleged insurance for and a loss sustained by fire by the plaintiff.

The 16th instruction was given upon a broad and comprehensive issue involving a compliance with all the requirements in respect to the proof of loss, and without a tedious rehearsal of the evidence upon this point, embracing a voluminous correspondence between the plaintiff's counsel and an adjuster of the defendant company, we are clearly of opinion that it warrants the charge of the court in respect to the eighth issue, and not less so the finding of the jury in the affirmative in response thereto.

The instructions 17 to 20 inclusive, are rightfully refused.

The answer to the 22d instruction is found in the entire charge, which makes the liability of the defendant contingent upon the correctness of the declarations contained in the application, and thus assumes that the defendant might act upon them without further inquiry.

We cannot see the pertinency of the matter of the 23d instruction, nor what use in argument was made of the defendant's failure to read the deposition of its adjusting agent, nor indeed that anything occurred afterwards (for the instruction was asked before argument), which called for any direction of this sort during its progress. It seems not to have been noticed by the court, and we must assume the reasons for this, while not appearing, were sufficient.

The 24th instruction requires no further comment, and the 25th, which involves only matter of law, has become unimportant in consequence of the verdict.

Before dismissing the subject, it is proper to say that the strict accuracy required in the application to make the insurance contract binding on a company, is in the statement of facts, known or assumed to be known, and declared as such, not in the opinion formed and expressed as to the worth or value of property; and hence an honest, though erroneous estimate put upon it, cannot be a vitiating element in the contract. It might be otherwise if intended to deceive and secure some unfair advantage from the company through its misplaced confidence, and, therefore, an issue was framed numbered 6 to present the imputed overvaluation in this aspect, and the finding relieves the plaintiff of an intentional misrepresentation.

The cases cited in the brief of the defendant's counsel are in accord with this view: *Jeffries vs. Life Insurance Co.*, 22 Wall, 47; *Ætna Life Ins. Co. vs. France*, 91 U. S., 510; *Bobbitt vs. L. &*

L. & G. Ins. Co., 76 N. C., 70, and large number of other references in the brief.

After the rendition of the verdict, the same rulings, the exceptions to which have been reviewed, were assigned as grounds in support of a motion to set aside the verdict and award a venire de novo, and especially that there had been no evidence offered to sustain the findings upon the 3d, 4th, 5th, 6th, 7th, 8th, and 10th issues.

This is but a renewal of previous exceptions, and we will only remark that the seventh must have been intended to refer to an issue of that number in a previous enumeration of the issues, and not to that passed on by the jury bearing the same number. This latter is only an inquiry as to the value of the property burned, about which there was much evidence.

The motion for judgment upon the verdict for the defendant finds no support therein.

The judge who presided at the trial, and seems to have given a patient hearing to the argument in support of the long array of exceptions, and to have correctly administered the law in disposing of them, in explanation of the voluminous record sent up says it was in deference to the demands of appellants' counsel, and while his notes do not show that the plaintiff testified, *seriatim*, that the storehouse and articles therein covered by the policy were worth, separately, the sums at which they are valued in her application, yet the charge was written when his recollection was fresh and was predicated upon her testimony as being such. We must, therefore, accept the fact to be correct.

Upon a calm review of the case as presented in the appeal, we find no error which entitles the defendant to a reversal of the judgment, and it must be affirmed.

No error. Affirmed.

## SUPREME COURT OF MICHIGAN.

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Error to Shiawassee.

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KITCHEN

vs.

HARTFORD FIRE INS. CO.\* }

The application which was a warranty, was silent as to the effect of other insurance, and a question therein as to what other insurance existed was not answered. The application was made through a soliciting agent who was authorized to deliver policies and receive premiums, but not to fill blank policies. The policy provided that it should be void in case of other insurance not made known. The agent was informed that other insurance would be applied for when the application was made, and was afterwards notified that it had been procured and requested to notify the company, in all of which he acquiesced.

*Held*, That the knowledge and conduct of the agent was a waiver of forfeiture.

JAMES M. GOODELL, *for Plaintiff*.

M. V. & R. A. MONTGOMERY, *for Defendant and Appellant*.

CHAMPLIN, J.

This is an action brought by the plaintiff to recover from the defendant the amount claimed to be due upon a policy of insurance. The policy in question was issued at the company's agency in Chicago, and is there countersigned as of date of January 12, 1883. The risk was to commence on that day at noon and extend to January 12, 1884, at noon. The policy was issued upon a written application signed by the assured, which was made a condition of the

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\* Opinion filed, June 3, 1885.

insurance, a part of the contract, and a warranty on the part of the assured. The property insured consisted of a store building, valued at \$1,200, and insured for \$800, and a stock of goods contained in the store building, valued at \$5,000, and insured for \$1,500, located at Bancroft, Shiawassee County, Michigan. The application for insurance was made to F. M. Douglas, who was an agent of defendant residing at Bancroft, and duly authorized to solicit and forward application for insurance, deliver policies and renewals to applicants, and collect and forward premiums on same; subject to a book of instructions furnished him and made a part of his authority, and also to such rules and instructions as he might receive from time to time from the Chicago office. The book of instruction and rules and instructions were not given in evidence. The company employs two kinds of agents,—one called a surveyor, to which class Douglas belonged. These agents were not intrusted with blank policies, and had no authority to fill out policies or make indorsements thereon. The other kind are styled recording agents, who are intrusted with the custody of policies, and have authority to fill out and deliver them, as well as to make indorsements thereon.

The application signed by plaintiff was dated January 11th. In it nothing is said about the effect upon the policy to be issued thereunder in case other insurance is effected upon the property insured without the consent of the company. The only reference to other insurance are the following questions: "What other insurance on property; in what company, and rate?" To which there is no answer. "What rate has been paid?" Answer. "2." "Has risk been declined by any company?" A. "No." Mr. Douglas was postmaster at Bancroft, and taking this application from Mr. Kitchen, forwarded it to the company, delivered the policy, and collected the premium. This single case is all the insurance business he ever did. The policy contains the following clause: "If an application, survey, plan, or description of the property herein insured is referred to in this policy, such application, survey, plan, or description shall be considered a part of this policy, and a warranty by the assured; and if the assured, in written or verbal application, makes any erroneous representation, or omits to make known any fact pertaining to the risk; or if there shall be any other insurance, whether valid or otherwise, on the property insured, or any part thereof, at the time this policy is issued, or at any time during its continuance, without the consent of this company written hereon — \* \* \* this policy shall be void."



When Mr. Kitchen made the application to Mr. Douglas for the insurance, he informed him that he should take out other insurance upon his stock with Mr. Simonson, another insurance agent at Bancroft, who was then absent, as soon as he returned home. Mr. Douglas says he told Mr. Kitchen it would not be necessary to mention it in the application, but when he got his policy from Mr. Simonson he would have to get permission from the Hartford. After he received the Hartford policy, and within two or three days, he took in the policy of the Sun Insurance Company, represented by Mr. Simonson, and Mr. Kitchen testifies that he at once informed Mr. Douglas, and requested him to notify his company of such additional insurance.

The store and contents burned September 3, 1883, and were totally lost. October 8, 1883, proofs of loss were made, and forwarded to the company's agency at Chicago on October 16th, and soon after he received the following reply :—

CHICAGO, October 19, 1883.

"*Elijah D. Kitchen, Esq., Bancroft, Michigan.*—DEAR SIR: We are in receipt of yours of the sixteenth inst., inclosing proofs of loss under policy No. 38,034, of the Hartford Fire Insurance Company, of Hartford, Connecticut, issued at its general agency at Chicago, Illinois, insuring eight hundred dollars on building, and fifteen hundred dollars on stock of merchandise therein, property belonging to you, and located at Bancroft, Michigan. Upon examination of such proofs of loss, we learn that there was twenty-five hundred dollars other insurance upon the stock insured in said Hartford policy, which, by its terms, is void by reason of such other insurance, without notice to this company, and its consent written thereon. We refer you to the conditions of your said Hartford policy, and hereby notify you that this company denies any and all liability under said policy number 38,034, by reason of the other insurance as aforesaid, without notice and the consent of this company written thereon. Accompanying said proofs are duplicate bills of purchase which we hold subject to your order, in case you desire to use them elsewhere.

Yours very truly,

"W. H. TAYLOR, 2d Assistant G. A."

The plaintiff contends that his case comes within, and is ruled by *Westchester F. Ins. Co. vs. Earle*, 33 Mich., 143. On the other hand, the defendant claims that the case is ruled by the principles

laid down in *New York Cent. Ins. Co. vs. Watson*, 23 Mich., 486. Both of those cases turned upon the effect to be given to the clause in the policy which rendered it void in case any other insurance had been or should be made upon the property, and not consented to in writing by the company; and also, whether, under the circumstances of each case, there had been a waiver of the condition or an estoppel by acts in pais by the company. In the *Watson* case additional insurance had been taken out, and the company had never consented in writing. The trial judge left it to the jury to determine whether or not there had been any waiver of this condition or of the forfeiture under it. This court held that there was nothing to authorize this question to be submitted to the jury; that under the decisions of *Western Ins. Co. vs. Riker*, 10 Mich., 279, and *Security Ins. Co. vs. Fay*, 22 Mich., 467, the policy became absolutely void at once upon the obtaining the last insurance without consent; that nothing could revive them short of a new contract on valid consideration, or such conduct as, by misleading the insured to their prejudice, would operate as an estoppel. And, speaking of the case before it, the chief justice who delivered the opinion said: "There is no item of testimony tending, in the remotest degree, to show that any such contract was made, or that the insured did anything by the encouragement of the plaintiff in error, or their lawful agents, to their own prejudice, or anything which they would not have done under other circumstances. There is no evidence that the insurers knew anything about it. But mere knowledge of it, without some other act knowingly done to the prejudice of the insured, would not amount to anything more than knowledge that the latter had seen fit to terminate the policies."

This case was followed by *Allemania F. Ins. Co. vs. Hurd*, 37 Mich., 11, where a similar clause was under consideration, and there it was not claimed that the company ever consented to the additional insurance, or had any notice thereof, except as appeared from a letter, written by the agents of the company to the insured in reply to one received by them, as follows:—

"GENTLEMEN: Your favor of the thirtieth inst. at hand, and noted. We will, of course, allow other concurrent insurance with the Allemania policy, and will also place more insurance at the same rate that we charged you before, and do it in 'A1' company or companies. Our Mr. Bussey is at present in the western part of the State on special work. Trusting to hear from you at your earliest convenience, we remain," etc.

It was held that this letter did not amount to a consent to any specific additional insurance, although it expressed a willingness to permit additional insurance, and offered to place it upon the same property at the rates before charged. Mr. Justice Marston said : "The correspondence between the parties would not take the place of the consent required by the terms of the policy, and the policy of insurance issued by the plaintiff in error became absolutely void at once, upon the obtaining of the additional insurance without consent."

The policy in the case of *Westchester F. Ins. Co. vs. Earle*, 33 Mich., 143, contained a like clause, and one question prominently discussed in that case was whether there could be a waiver by parol, or by acts and conduct, of the written condition; and it was held there could be. The charge of the court under which a recovery was had, and which was sustained in this court, was as follows : "That in order to escape the condition the insured must show that the agent had done some act, or made some representation or remained silent when he ought to have spoken, and thereby misled the insured, and induced them to rely on the policy, to their injury, and, by causing them to believe the policy remained in force, prevented them seeking other insurance, and that such conduct would preclude the company from setting up the condition, and that notice to the agent was notice to the company." The testimony in the case showed that the first application for further insurance was to the agent, who said he would try to get it placed in some other company, and after waiting a time without his doing so they placed the risk elsewhere. In a conversation the agent said it would make no difference to the company, but did not say in so many words that it need not be consented to in writing, though that inference was drawn from all that took place. Immediately after the new insurance was obtained they informed the agent of the amount, by a letter left in his office, and shortly after met the agent, who referred to the new insurance, and asked why it had not been placed with him. No objection was made, and no suggestion offered, that any breach of condition had been created or would be relied on. Upon this testimony this court held that the jury had the right to believe, and that the insured had reason to rely on the validity of their insurance, and that nothing had been done to invalidate it; and Mr. Justice Campbell said : "If Atwater," the agent, "himself had been the insurer, it would be difficult to find a plainer case of estoppel. It would have been a direct fraud to repudiate the obligation after such conduct as

could not have failed to induce the insured to rest satisfied with their policies."

It is now proper to return to the record in this case. The judge certifies that the bill of exceptions contain, substantially, the testimony given on the trial. With reference to obtaining additional insurance the plaintiff testified that when he applied to Mr. Douglas, the following conversation occurred: "I told him that I wanted to take fifteen hundred dollars in his company on the stock, and eight hundred dollars on the building, and that I was going to take \$2,500 in the other company with Mr. Simonson as soon as he returned home. Mr. Douglas said that was all right. When he wrote the application out, I says to him, 'Now, notify your company that I am going to put this additional insurance on when you send in this application.' He says to me, 'It is unnecessary; ours is the first policy, and we don't care about that.' Then I told him to send it in anyway, and tell them I was going to put additional insurance on. He says, 'It is only a supposition you are going to put additional insurance on, and we cannot notify the company on a supposition.'" He further testified as follows: "Mr. Simonson came back and gave me the application, and when this second policy came back that I got from Mr. Simonson, I was going to either my dinner or my supper,—I will not be sure which,—and had this policy with me. Mr. Simonson brought it in, and I took it. I called for my mail when Mr. Douglas was there. I says to him, 'If you have not informed your company that I have put this additional insurance on when you sent in the application, do it now, for here is the policy.' I had the policy in my hand at the time, that I got from Mr. Simonson, the same day I got it. I never had any other talk with Mr. Douglas until after the fire. He made no answer."

Mr. Douglas' attention was called to this testimony, and gave his version of the matter as follows: "That Mr. Kitchen said he expected to take some additional insurance with Mr. Simonson, but did not tell him the company or the amount; that he replied: 'When you get your insurance, you can get permission,'—or, 'we will have to get permission from the company' (the Hartford company); that Mr. Kitchen said nothing about that additional insurance that he recollected of; that he had no recollection of any talk of the kind testified to by Mr. Kitchen as having occurred in the post-office, and knew of no such talk; that he was postmaster then, and had no recollection of handing Kitchen a letter and talking with him about having received another insurance policy. He stated on cross-

examination that he had a conversation with Mr. Simonson soon after the Sun policy was issued, in which he told Mr. Simonson that Mr. Kitchen said he expected to get out further insurance, or take out a policy with him; and he admitted that in a conversation with Mr. Simonson and Mr. Mosely he stated to Mr. Kitchen at the time that it was not necessary to mention the fact that he was going to obtain additional insurance in the application."

No consent was indorsed on the policy. The foregoing is all the testimony that bears on the question of waiver, or out of which an estoppel is raised to prevent defendant from insisting upon the breach of this condition of the policy. Upon this testimony there can be no question but that the plaintiff relied upon the statements of Douglas, as authorizing him to obtain additional insurance, and upon having done all that was required of him when he informed Douglas of the name of the company, and the fact that he had perfected such new insurance; and that he relied upon his insurance as effectual for his protection to the amount insured. If Douglas had been the insurer, his conduct after what had transpired between him and plaintiff would have estopped him from relying on the breach of the condition. Nothing can be plainer than this. The controversy, therefore, as in the Earle case, is reduced to the inquiry, whether, with the written condition of the policy in view, Mr. Douglas had authority, or was Kitchen justified in assuming he had authority, to bind the company by such conduct as would have bound himself.

In the case referred to it was said that the powers of the agent did not appear to be restricted in any way. In this case the authority of the agent was restricted in the manner hereinbefore stated; and the question is whether the company is bound by the acts or conduct of an agent who has power to solicit insurance, make examination and survey of premises, take applications therefor and forward them to the home company or to its branch agency, or other agency where policies are issued, to deliver policies, and collect premiums. There is no evidence that any restriction upon his authority as agent was brought to the knowledge of the plaintiff, or others dealing with him. He did not profess to be merely a solicitor for insurance. He professed to act as agent for defendant, signed his name to the approval of the application as agent, assumed to direct whether mention should be made of the proposed additional insurance, and gave no information to the applicant of his restricted powers. Under these circumstances, if he had no au-

thority to waive the conditions of the policy, which he did by telling plaintiff to first take his additional insurance, and then get permission (for, as was held in *New York Cent. Ins. vs. Watson*, the policy became void the moment the new insurance was effected), who is to suffer the loss occasioned by such want of authority, the insured who relied upon the representations and conduct of the agent, or the company whose agent he was?

The point was discussed in *Security Ins. Co. vs. Fay*, 22 Mich., 467, by Mr. Justice Campbell. In that case the insured relied much upon the action of the local agent after the new insurance was placed, who, as representing the company at that place, and being the person through whom the insured dealt with them, might be authorized to bind them, except in matters where, by the policy itself or by other notice, his authority was made known to have been limited. Mr. Justice Campbell says: "Assuming then, as we must, that, upon the case as it appeared on the trial, there was no valid consent until Betts may have so acted as to confer it, the question next arises whether there can be a waiver of the condition requiring written consent, and if so, whether there was any evidence which would authorize the case to go to the jury on that point. We have held heretofore that a party dealing with an agent, through whom he applies for and obtains a policy, has a right to presume that such material facts as are made known to him are known to his principals. We have also held that when, with a knowledge of such facts, the insurers accept premiums and keep them and issue policies, they cannot insist upon conditions which it would be dishonest to enforce after such action." Such is this case. Kitchen had a right to presume, when he applied for a policy from Douglas, that the fact made known to him, with reference to his obtaining additional insurance, was known to his principals, and the instructions the agent then gave with reference thereto were the instructions of his principals, and that he was authorized, by the assent then given, to obtain such new insurance without avoiding his policy. The conduct of the agent at that time, and also when afterwards he was informed of the obtaining of the policy in the Sun Company, and the action had in reliance upon it, would render it a fraud for the defendant to recede from what the plaintiff was induced to expect. The defendant must therefore be held bound by the representations and acts of its agent Douglas, and must be deemed estopped from now insisting upon the enforcement of this clause of its policy.

The other questions set up in the notice of defense to the action,

relative to the overvaluation, were questions of fact which have been found by the jury in plaintiff's favor. There was no error in the rulings of the court in the admission or rejection of testimony. Several errors are assigned upon the language of the charge as given, but as it was in substantial accord with the views herein expressed, we perceive no error; and the judgment is affirmed.

The other justices concurred.

UNITED STATES CIRCUIT COURT OF WISCONSIN.

BARRY

vs.

UNITED STATES MUT. ACCIDENT ASS'N.\*

In an action on an accident insurance policy the question whether deceased was injured by jumping from a platform as alleged, is a question of fact for the jury to determine from all the circumstances of the case as shown by the evidence.

The term "accidental," as used in an accidental policy, is used in its ordinary sense, and means "happening by chance, unexpectedly, or not as expected."

An injury that is internal may afford external indications or evidences, which are visible signs of the injury within the meaning of such term as used in an accident policy.

In an action on an accident policy where it is shown that the deceased sustained an accidental injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the original injury will be considered as the proximate and sole cause of death; but if an independent disease or disorder, not necessarily produced by the injury, supervened upon the injury, or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and death resulted wholly or in part from such disease, the injury cannot be considered the sole and proximate cause of death.

C. M. BICE, *for Plaintiff.*

FINCHES, LYNDE & MILLER, *for Defendant.*

Charge of DYER, J.

On the twenty-third day of June, 1882, the defendant association issued to John S. Barry, then residing at Vulcan, Michigan, but since deceased, what may be termed a contract of insurance, by which it agreed to pay his wife, Theresa A. Barry, a sum not

\* Decision rendered, March, 1885. From *Federal Reporter*.



exceeding \$5,000, within sixty days after sufficient proof that, at any time within the continuance of membership of Dr. Barry in the association, he had sustained bodily injuries, effected through external, violent, and accidental means, and that such bodily injuries alone had occasioned death within ninety days from the happening thereof. This is a suit brought by the beneficiary named in the policy to recover the amount of the insurance.

It is alleged that the deceased sustained an injury, within the meaning of the policy, on the twentieth day of June, 1883, and it is proven that he died on the twenty ninth day of that month. There is no question, therefore, that if he was injured as claimed, he died within the time after the alleged injury named in the policy; nor is there any question that the policy was in force at the time of his death. By the terms of the policy it was provided, as already stated, that to entitle the beneficiary to the sum of \$5,000, the death should be occasioned by the bodily injuries alone, effected through external, violent, and accidental means. Also that the benefits of the insurance should not extend to an injury of which there was no external and visible sign; nor to any injury happening, directly or indirectly, in consequence of disease; nor to any death or disability caused wholly or in part by bodily infirmities, or disease existing prior or subsequent to the date of the policy; nor to any case except where the injury was the proximate or sole cause of the disability or death. The issue between the parties may be briefly stated:—

It is claimed by the plaintiff that, on the occasion mentioned by Dr. Hirschman, when the deceased was at Iron Mountain, he sustained an injury by jumping from a platform to the ground; that this injury was effected by such means as are mentioned in the policy; that the deceased at the time of the alleged accident was in sound physical condition and in robust health; and that the alleged injury was the proximate and sole cause of death. The defendant denies that the deceased sustained any injury that was effected through accidental means, and also contends that if any injury was sustained, it was one of which there was no external or visible sign, within the meaning of the policy; and that the supposed injury was not the cause of the death of the deceased, but that he died from natural causes. The case therefore resolves itself into three points of inquiry: First. Did Dr. Barry sustain internal injury by his jump from the platform on the occasion testified to by Dr. Hirschman? Second. If he did sustain injury as alleged, was it effected through external, violent, and accidental means, within the sense

and meaning of the policy, and was it an injury of which there was an external and visible sign? Third. If he was injured as claimed, was that injury the proximate cause of his death? To entitle the plaintiff to a verdict, each and all of these questions must be answered by you in the affirmative; and if, under the testimony, either one of them must be negatively answered, then your verdict must be for the defendant.

The first question,—viz., was the deceased, Dr. Barry, injured by jumping from the platform,—is so entirely a question of fact to be determined upon the testimony, that the court must submit it without discussion to your determination. In passing upon the question, you will consider all the circumstances of the occurrence as laid before you in the testimony, the apparent previous physical condition of Dr. Barry, the subsequent occurrences and circumstances tending to show the change in his condition, the relation in time which the first developments of any trouble bore to the time when he jumped from the platform, the nature of his last sickness, and the symptoms disclosed in its progress and termination. Further, you will inquire what evidence, if any, did the post-mortem examination, and any and all subsequent examinations of the parts alleged to have been the seat of the supposed injury, furnish of an actual physical injury; what connection, if any, does there or does there not appear to be between the act of jumping from the platform and the subsequent events and circumstances which culminated in death, including the result, as you shall find it to be, of post-mortem investigations. The question is before you, in the light of all proven facts, for determination. The court cannot indicate any opinion upon it without invading your exclusive province, and by your ascertainment of the facts the parties must be bound. There is presented in the case a train of circumstances. Do they, or not, so to speak, form a chain connecting the ultimate result with such a previous cause as is alleged? Was the act of jumping from the platform adequate or inadequate to produce an internal injury? Thus may you properly pursue the inquiry, guided by and keeping within the limits of the testimony.

If you find that injury was sustained, then the next question is, was it effected through external, violent, and accidental means? This is a pivotal point in the case, and therefore vitally important. The means must have been external, violent, and accidental. Did an accident occur in the means through which the alleged bodily injury was effected? It does not help you to a proper conclusion

to say merely that the injury itself, if there was one, was an accident or accidental. That was the result, and not the means, through which it was effected. The jumping off the platform was the means by which the injury, if any was sustained, was caused. Was there anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground? The term accidental is here used in its ordinary, popular sense, and in that sense it means "happening by chance, unexpectedly; taking place not according to the usual course of things," or not as expected. In other words, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, then, I suppose, it cannot be called a result effected by accidental means. But if in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted from the accident, or through accidental means. We understand from the testimony, without question, that the deceased jumped from the platform with his eyes open, for his own convenience, in the free exercise of his choice, and not from any perilous necessity. He encountered no obstacle in jumping, and he alighted on the ground in an erect posture. So far we proceed without difficulty. But you must go further and inquire,—and here is the precise point on which the question turns,—was there or not any unexpected or unforeseen or involuntary movement of the body from the time Dr. Barry left the platform until he reached the ground, or in the act of alighting? Did he or not alight on the ground just as he intended to do? Did he accomplish just what he intended to, in the way he intended to? Did he or not unexpectedly lose or relax his self-control in his downward movement? Did his feet strike the ground as he intended or expected, or did they not? Did he or not miscalculate the distance, and was there or not any involuntary wrenching or turning of the body in the downward movement, or in the act of alighting on the ground? These are points directly pertinent to the inquiry in hand; and I instruct you that if Dr. Barry jumped from the platform and alighted on the ground in the way he intended to do, and nothing unforeseen, unexpected, or involuntary occurred, changing or affecting the downward movement of his body, as he expected or would naturally expect such a movement to be made, or causing him to strike the ground in any different way or position from that which he anticipated, or would naturally anticipate, then any resulting injury was not effected through any accidental means. But if,

in jumping or alighting on the ground, there occurred, from any cause, any unforeseen or involuntary movement, turn, strain, or wrenching of the body, which brought about the alleged injury; or if there occurred any unforeseen circumstance which interfered with or changed such a downward movement as he expected to make, or as it would be natural to expect under such circumstances, and as caused him to alight on the ground in a different position or way from that which he intended or expected, and injury thereby resulted,—then the injury would be attributable to accidental means. Of course, it is to be presumed that he expected to reach the ground safely and without injury. Now, to simplify the question and apply to its consideration a common-sense rule, did anything, by chance, or not as expected, happen in the act of jumping or striking the ground, which caused an accident? This, I think, is the test by which you should be governed in determining whether the alleged injury, if any was sustained, was or was not effected through accidental means. You have the testimony in relation to the occurrence which it is claimed by the plaintiff produced in Dr. Barry a mortal injury, and taking it all into consideration, and applying to the facts the instructions of the court, you will determine whether, if any injury was sustained, it was effected through external, violent, and accidental means.

The defendant claims that if Dr. Barry did sustain injury, it was one of which there was no external and visible sign and therefore that the plaintiff is not entitled to recover. In the discussion of this question, counsel were understood to contend that no recovery could be had under a policy in the form and terms of this one, if the injury was wholly internal. In that view, the court cannot concur. It is true, there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of this policy. Such an interpretation of the contract as is contended for in that particular, would, in the opinion of the court, sacrifice substance to shadow and convert the contract itself into a snare, an instrument for the destruction of valuable rights. Visible signs of injury, within the meaning of this policy, are not to be confined to broken limbs or bruises on the surface of the body. There may be other external indications or evidences which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see; complaint of internal soreness is not such a sign, for that you cannot see; but if the internal injury produces, for example, a pale and

sickly look in the face, if it causes vomiting and retching, or bloody or unnatural discharges from the bowels; if, in short, it sends forth, to the observation of the eye, in the struggle of nature, any signs of the injury,—then those are external and visible signs, provided they are the direct results of the injury. And with this understanding of the meaning of the policy, and upon the evidence, you will say whether, if Dr. Barry was injured as claimed, there were or were not external and visible signs of the injury; and the determination of this point will involve the consideration of the question, whether what are claimed here to have been external and visible signs were, in fact, produced by—were the result of—the injury, if any was sustained.

The next question is, if Dr. Barry was injured as claimed, was the injury the sole or proximate cause of his death? Interpreting and enforcing the policy according to its letter and spirit, it must be held that if any other cause than the alleged injury produced death there can be no recovery. In short, to entitle the plaintiff to recover, you must be satisfied that the alleged injury was the proximate cause of death. Whether a cause is proximate or remote does not depend alone upon the closeness in the order of time in which certain things occur. An efficient, adequate cause being found, must be deemed the true cause, unless some other cause, not incidental to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an internal organ, and that necessarily produced inflammation, and that produced a disordered condition of the injured part, whereby other organs of the body could not perform their natural and usual functions, and in consequence the injured person died, the death could be properly attributed to the original injury. In other words, if these results followed the injury as its necessary consequence, and would not have taken place had it not been for the injury, then I think the injury could be said to be the proximate or sole cause of death; but if an independent disease or disorder supervened upon the injury, if there was an injury,—I mean a disease or derangement of parts not necessarily produced by the injury,—or if the alleged injury merely brought into activity a then existing but dormant disorder or disease, and the death of the deceased resulted wholly or in part from such disease, then it could not be said that the injury was the sole or proximate cause of death.

It is claimed by the plaintiff that the supposed jar or shock said to have been produced by jumping from the platform, caused some dis-

placement in the duodenum; that it became occluded; that there was constriction and occlusion of that intestine, which was accompanied with consequent inflammation. In short, that the deceased had duodenitis as the direct result of the alleged original injury, and in consequence, died. This contention is urged upon all the circumstances of the case, and upon the testimony offered by the plaintiff tending to show the symptoms which accompanied the last sickness, the diagnosis of the case made by attending physicians, and the alleged developments of the autopsy. It is contended in behalf of the defendant that there was no constriction, occlusion, or inflammation of the duodenum, that the deceased did not have duodenitis, and that no physical injury is shown to have resulted from jumping from the platform. This claim is based upon the contention that the various symptoms manifested in the last sickness of the deceased were consistent with natural causes,—with some undiscovered organic trouble, not occasioned by violence or sudden injury; that the conclusions of the physicians who made the post-mortem examination were erroneous; and that the microscopic examination of the parts in New York demonstrated such alleged error. Concerning the microscopic test made in New York by Dr. Carpenter, the plaintiff contends that it is not reliable and should not be accepted for reasons urged in argument, and which I need not repeat.

Now, between these conflicting claims, weighing and giving due consideration to all the testimony, you must judge. If the deceased died of some disease or disorder not necessarily resulting from the original injury, if there was an injury, then the defendant is not liable under this policy; but if the deceased received an internal injury which, in direct course produced duodenitis, and thereby caused his death, then the injury was the proximate cause of death.

Since the plaintiff has alleged in his complaint and claims that the deceased received an injury in the duodenum, I am asked by the defendant's counsel to instruct you that if the deceased did not die of duodenitis, or if you should find that the alleged jump did not produce or result in a stricture of the duodenum, then your verdict should be for the defendant. This instruction I must decline to give, for my opinion is that if the deceased sustained internal injury in any part of his body, of which there was an external and visible sign, and if that injury was effected through the means named in the policy, and if such injury was the sole or proximate cause of death, then the plaintiff is entitled to recover.

As I once had occasion to observe in a case somewhat similar in

general character to this, you ought not to adopt theories without proof, nor to substitute bare possibilities for positive evidence of facts testified to by credible witnesses. Mere possibilities, conjectures, or theories should not be allowed to take the place of evidence. Where the weight of credible testimony proves the existence of a fact, it should be accepted as a fact in the case. Where, if at all, proof is wanting, and the deficiency remains throughout the case, the allegation of fact should be deemed not established.

Now, to briefly sum up the case: If you find from the evidence that the deceased, on the twentieth day of June, 1883, sustained a bodily injury, and that such injury was effected through external, violent, and accidental means, and was one of which there was an external and visible sign, and that the injury was the proximate or sole cause of death, then the plaintiff should have a verdict in her favor. If, on the contrary, you find either that the injury was not sustained, or that, if it was sustained, it was not effected through external, violent, and accidental means, or was an injury of which there was no external or visible sign, or that it was not the proximate or sole cause of death, then your verdict should be for the defendant.

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NOTE.—The cases cited by counsel, and considered by the court on the trial of this case, were *Whitehouse vs. Travelers Ins. Co.*, 7 Ins. Law J., 23; *Southard vs. Railway Pass. Assur. Co.*, 34 Conn., 574; *N. A. Life & Acc. Ins. Co. vs. Burroughs*, 69 Pa. St., 43; and *McCarthy vs. Travelers Ins. Co.*, 8 Ins. Law J., 208.

## SUPREME COURT OF IOWA.

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*Appeal from Black Hawk Circuit Court.*

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STATE EX REL. GRAHAM

vs.

MILLER AND ANOTHER.\*

The Ancient Order of United Workmen is to be regarded as a life insurance organization, and as the supreme lodge organized in Kentucky has not the guaranteed capital required by code Iowa, § 1160, it could not do business in Iowa, and the grand lodge of that State was not bound to obey its mandates in relation to the relief law; and the provisional grand lodge, formed after the suspension of the grand lodge for a refusal so to do, is not to be considered as the grand lodge of Iowa, and as such entitled to all the rights, privileges, and franchises of the order.

The petition states that "the grand lodge of the Ancient Order of United Workmen of Iowa" is a corporation duly organized under chapter 2, tit. 9, of the Code of Iowa, relating to corporations other than those for pecuniary profit; that its articles of incorporation were duly filed and recorded in the recorder's office of Scott County, in said State, in June, 1874. The object of this action is to determine who are the officers of the grand lodge, and who is entitled to its rights, privileges, and franchises,—the relators and those they represent, or the defendants and the persons they represent. The petition, at great length, states the facts on which the relators rely. Certain allegations of the petition were admitted and others denied by the defendants. The material facts are sufficiently referred to in

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\* Decision filed, April 22, 1885. From *N. W. Reporter*.



the opinion. There was a trial by jury, and the plaintiffs introduced their evidence, at the conclusion of which "the plaintiffs moved the court on the undisputed facts to instruct the jury to return a verdict for the defendants." This motion was overruled, and the defendants introduced their evidence. The court, on motion, directed the jury to return a verdict for the plaintiffs, which being done, judgment was rendered that the relators and their associates "be, and they are hereby, adjudged and declared to be and to constitute the said corporation, and to be entitled to exercise its corporate rights, powers, franchises, and offices." The defendants appeal.

NICHOLS & BURNHAM, H. B. FOUKE, H. BOIS, and J. J. FULLERTON,  
*for Appellants.*

PUTNAM & ROGERS DAVISON & LANE, and H. C. HEMENWAY, *for Appellees.*

SEEVERS, J.

This cause has been elaborately argued in print and orally at bar. Every conceivable phase of the case has been fully discussed by the able counsel representing the respective parties. The arguments of counsel and the voluminous record have been examined and fully considered, and therefrom we reach the conclusion that the material question to be determined is whether the "Ancient Order of United Workmen" is or should be classed as a fraternal organization, as the plaintiffs contend it is, or whether it is a mutual life insurance company, as the defendants contend. This, as we understand, briefly stated, is the material contention of the parties. We do not understand there is serious dispute as to the law which must govern the decision to be made when the character of the organization is determined. It is therefore essential that a full statement should be made of the organization and objects of the order. We find from the record that during 1873, or prior thereto, there were in the States of Pennsylvania, Ohio, and Kentucky organized grand and subordinate lodges of the order. Representatives chosen for that purpose from the said grand lodges, organized in that year a supreme lodge by adopting what was designated as the constitution of the supreme lodge of the Ancient Order of United Workmen. The objects of such organization are declared in a preamble or preface to the constitution to be as follows: "Pretermittin all reference to nationality, political opinions, or denominational distinctions or preferences, but believing in the existence of a God, the creator and preserver of the universe, and recognizing as a funda-

mental principle that usefulness to ourselves and others is a duty which should be the constant aim and care of all, the following are submitted as the aims and purposes of the Ancient Order of United Workmen: (1) To embrace and give equal protection to all classes and kinds of labor, mental and physical; to strive earnestly to improve the moral, intellectual, and social condition of its members; to endeavor by wholesome precepts, fraternal admonitions, and substantial aid, to inspire a due appreciation of the stern realities and responsibilities of life. (2) To create a fund for the benefit of its members during sickness or other disability, and in case of death to pay a stipulated sum to such person or persons as may be designated by each member, thus enabling him to guaranty his family against want. (3) The adoption of such secret work and means of recognition as will insure the protection of its members wherever the order may exist. (4) To hold lectures, read essays, discuss new inventions and improvements, encourage research in art, science, and literature, and, when practicable, maintain a library for the improvement of the members.

The constitution is lengthy, and contains specific provisions for the government of the order of which the supreme lodge, as its name indicates, is the supreme authority and head of the order, to whom appeals might be taken, and whose decision in relation to any matter legitimately before it is final and conclusive. The material provisions of this constitution will be sufficiently referred to hereafter. In general it may be now said that under its provisions subordinate lodges might be formed in any State where no grand lodge was in existence, and that such subordinate lodges were under the exclusive jurisdiction of the supreme lodge, and that when the membership of such subordinate lodges reached a specified number then a grand lodge might be formed which had jurisdiction over the subordinate lodges in such State, but the supreme lodge had jurisdiction of and the power to control the grand lodge in accordance with the constitution of the supreme lodge and rules of the order. The first meeting of the chosen representatives for the organization of the supreme lodge was held in February, 1873, and when organized, it or its officers became a corporation under a statute of Kentucky, which authorized the incorporation of the "grand lodge of the A. O. U. W. of Kentucky, and the supreme lodge." Said statute, among other things, provided that "a supreme lodge may be established by this grand lodge in conjunction with other grand lodges, and when so established the officers thereof and their successors in perpetuity

shall become a body politic and corporate under the name and style of the 'Supreme Lodge of the Ancient Order of United Workmen of the United States;' and on accepting this charter shall be entitled to all the rights, privileges, and immunities therein contained, with the power to establish other grand lodges within the United States, with like powers, privileges, and immunities, but subordinate to said supreme lodge." After the organization of the supreme lodge, subordinate lodges under its jurisdiction were organized in the State of Iowa, and thereafter the grand lodge was formed, the amended constitution of which provides that it "shall have full power and privilege of a grand lodge acting in accordance with the privileges granted it by the supreme lodge" of this jurisdiction.

The articles of incorporation of said grand lodge provide that its powers are subject to "such laws, rules, and regulations as are now and shall hereafter be prescribed by the supreme lodge of the A. O. U. W. of the United States."

In so far as they have any bearing in this case, the provisions of the constitution of the supreme lodge and the grand lodge are the same, and the preamble to the former declares that one of the objects of the organization is "to create a fund for the benefit of its members during sickness or other disability, and in case of death to pay a stipulated sum to such person or persons as may be designated by each member." This fund, payable on the death of a member, is known as the beneficiary fund, and is created by the payment by the members of specified sums of money as dues, and on the death of a member assessments are made on the members for certain sums of money to pay the death-loss of \$2,000. When there is a grand lodge in any State it is obligated to pay, and is charged with the duty of collecting and disbursing, such money. The grand lodge of Iowa had so obligated itself and was charged with such duty at the time the differences between it and the supreme lodge occurred, as will be presently stated. At a meeting of the supreme lodge, held in Boston in 1880, an amendment to the provisions of the constitution in relation to the beneficiary fund was adopted, and afterwards, at a meeting of said lodge, held in Detroit in 1882, the provisions so adopted were amended. By the amendments to the constitution so adopted what is designated as a relief fund was created for the relief of overburdened jurisdictions, and thereby the members of the order were required to contribute money for the payment of death-losses in other States, and the grand lodge of Iowa was charged with the duty of collecting the money of its mem-

bers and remitting the same to the supreme lodge. A relief board was created by the supreme lodge, who, under the authority vested in them, issued "Relief Call No. 1," and thereby the grand lodge of Iowa was required to collect of each member under its jurisdiction a named sum for the payment of death-losses in the State of Indiana. This the grand lodge declined to do, and thereupon, as the plaintiffs claim, the "charter of said grand lodge of Iowa" was suspended, and afterward a provisional grand lodge was formed under the authority of the supreme lodge. Afterwards, certain subordinate lodges and members of the order, who recognized the authority of the supreme lodge, through their representatives duly chosen, and claiming to be the grand lodge of Iowa, met and elected the relators officers of such grand lodge, and they claim they are entitled to all the rights and privileges thereof. It should also be stated that the subordinate lodges adhering to what the defendants claim is the grand lodge of Iowa, through their representatives, at a meeting of the grand lodge recognized by them, denied the authority of and seceded from the supreme lodge, and by an amendment to its constitution absolved itself, so far as it could, from all allegiance to the supreme lodge.

No person can be admitted as a member of the order unless he is a free white male of the full age of twenty-one years, and under fifty years old. He must be of good moral character, competent to earn a livelihood for himself and family, and a believer in the existence of a Supreme Being. In addition to which he must pass a satisfactory medical examination. A certificate of membership is issued, whereby the order obligates itself to pay the sum of \$2,000 on the death of a member, to whomever he may designate, provided all the rules and regulations of the order have been complied with.

The petition states "that one of the principal objects and functions of said association is to secure to each member thereof the payment, on his death, of the sum of two thousand dollars, subject to the fulfillment of the conditions imposed by the constitution and laws of the association." Counsel for the plaintiffs concede that such pecuniary provision is the same as that secured by ordinary life insurance; but, while this is so, it is contended that the association has no resemblance to any known life insurance company, for the reasons that the relations between such insurance companies and their members are purely business relations based upon contract, and therefore cannot be changed except by mutual consent. In such associations all that the assured has to do is to pay his dues

and assessments; but in this the right to pecuniary benefits, whether in case of sickness or death, is merely incident to and absolutely dependent upon continued membership in a fraternal society, subject to its laws, present or future, and defeasible by loss or suspension of such membership in any mode or for any cause provided by such laws; such as for immoral and unbecoming conduct, including a malicious or false charge against a "brother." On the other hand, the contention of the appellants is that, in order to determine the primary purpose of the association, reference must be had to the conditions of membership and the business conducted; and it is said that there is no dispute but what the applicant for membership must be insurable; that his application must be accompanied by a physician's certificate to that effect; and that the qualification for membership is made ultimately to depend upon the question as to whether the applicant is insurable, and when he is admitted into full membership a policy of insurance is issued to him, and every member is thus insured; nor can he be a member without keeping his policy in force. If he fails to pay dues and assessments, his membership in the association is forfeited.

We have thus stated at some length the claims of counsel, and as their respective statement of facts is, in the main, correct, and when the object of the organization, as stated in the preamble to the constitution, is considered in connection therewith, the conclusion is inevitable that the association has assumed the characteristics of a fraternal organization, and also of a life insurance company. The former, however, possibly predominate; for it is true, we think, that many, if not all, fraternal associations dispense in some form pecuniary benefits, and that purely life insurance companies do not have what is called secret work, a pass-word, or anything of a moral or scientific character, which in any manner affects the organization. Nor do purely fraternal organizations require that the members should be insurable. It is evident that the declared objects of the association should not alone be the controlling consideration, for they may be a mere pretense. To ascertain the primary purpose of this association, reference must be had to the business conducted, the manner of conducting it, and what provisions have been adopted for carrying into effect the several avowed objects of the organization. Doing this, we find that the certificate of membership provides that upon the death of each member there shall be paid to such person as he may designate the sum of \$2,000, and that thereunder he or his beneficiary is entitled to nothing more.

Elaborate and stringent provisions are made in relation to the beneficiary fund, payable on the death of a member, and for collecting and enforcing the payment thereof of such amounts as are assessed on each member; but we have been unable to discover any provision for enforcing any of the other declared objects of the association stated in the preamble to the constitution of the supreme lodge, including "sick benefits." If the provisions of a fraternal character be eliminated from the association, its primary and only purpose is that of a life insurance organization: *State vs. Bankers' Ass'n*, 23 Kan., 499; *Folmer's Appeal*, 87 Pa. St., 133; *Mason's B. Soc. vs. Winthrop*, 85 Ill., 537; *Same vs. Baldwin*, 86 Ill., 479; *State vs. Citizens' Ass'n*, 6 Mo. App., 163; *Bolton vs. Bolton*, 73 Me., 299.

We are satisfied, from an examination of the record, that the primary object and purpose of the association of the Ancient Order of United Workmen is to provide a beneficiary fund to be paid upon the death of each member, and that the avowed fraternal character of the association is merely incidental thereto. In fact, we go further than this, and from the record find that one of two things is true; that is to say, the fraternal objects of the association as avowed have been abandoned, or never were intended to be enforced. We find no evidence of their enforcement, or that they were ever regarded as material by the members of the association; while, on the other hand, the provisions in relation to the beneficiary fund have been enforced, and the accumulation and payment of such fund has been regarded as the object and purpose of the association. Therefore it must be regarded as a life insurance organization and within the provisions of the statute, which provides that "no foreign life insurance company, aid society, or association for the insurance of the lives of its members, and doing business on the assessment plan, shall be allowed to do business in this State unless it has a guaranteed capital of not less than one hundred thousand dollars in the State in which it is organized." Code, § 1,160.

The supreme lodge is a Kentucky organization, and its business and primary purpose is life insurance; and, under the foregoing statute, it is immaterial whether it is incorporated or not, for in either case it cannot do business in this State, for the reason that it has not the requisite guaranteed capital. If it is incorporated in Kentucky, as we think it is; and it has been so held, then, for other reasons, it cannot enforce the so-called relief law in this State for the purpose of relieving overburdened jurisdictions. Instead of stat-

ing the reasons at length, we refer to the following adjudicated cases: *Lamphere vs. Grand Lodge A. O. U. W.*, 47 Mich., 429, s. c., 11 N. W. Rep., 268; *Grand Lodge A. O. U. W. vs. Stepp*, 14 Pittsb., Leg. J., 164. Our conclusion is that the grand lodge of Iowa was not bound to obey the mandates of the supreme lodge in relation to the relief law. It therefore follows that the circuit court erred in not directing the jury to find for the defendants, and in directing a verdict for the plaintiffs.

**Reversed.**

## SUPREME COURT OF IOWA.

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*Appeal from Pottawattamie Circuit Court.*

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KOEHLER AND ANOTHER

vs.

CENTENNIAL LIFE ASS'N.\*

The policy provided that the sum collected on assessment should be paid to his wife M. and children, or their legal representatives.

*Held*, That the children of a former marriage were entitled to share in the distribution as beneficiaries. The name of the wife is descriptive of the person and not a designation of whose children are intended.

*Held*, That the provisions of a subsequent will of insured cannot aid in interpreting the policy where the will simply directed a division of this property between his wife, his children by the first marriage, and a step-son.

This action involves the question of the proper distribution of the avails of a life insurance policy. The circuit court held that the plaintiffs were entitled to the whole of the proceeds of the policy, and defendants appeal.

SMITH, CARSON & HART, *for Appellant.*

FRANK SHUM, *for Appellees.*

NEWMAN & BLAKE, *for the Insurance Company.*

ROTHROCK, J.

The policy of insurance was upon the life of George H. Koehler, who died on the twenty-sixth day of October, 1883. In his early life he was married to Margaret Knauf, now deceased. There were five children the issue of that marriage. After the death of his first wife he married Maglien Koehler, plaintiff herein. Said Maglien Koehler, prior to her marriage with George H. Koehler, had been married to one Kale, by whom she had one child, who is now living and who intervened in this action. There were two children, the issue of the marriage of Geo. H. Koehler and Maglien Koehler, to wit, Robert Koehler, plaintiff herein, and another who died Novem-

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\* Opinion filed, June 5, 1886.



ber 15, 1879. On the tenth day of April, 1877, George H. Koehler procured to be issued to him a policy upon his life, of which the following is a copy: "The Centennial Life Association, in consideration of the representations and agreements in the application therefor, and the sum of \$14 in hand paid, and the further sum of \$3.50 to be paid on the first day of November of each year hereafter, does hereby issue this policy to George Henry Koehler, of Macedonia, Pottawattamie County, Iowa, with the following agreement: On the death of said George Henry Koehler, he having conformed to all conditions hereof, and on satisfactory proof of said death having been filed with the secretary of the association, an assessment shall be made on all policy-holders of the association, according to the policy held by each, for as many dollars as there are policy-holders. \* \* \* And the sum collected on such assessments (less the added cost of collection) shall be paid to his wife, Maglien Koehler, and children, or their legal representatives, at the office of said association in Burlington, within ninety days from the filing of said proof of death." A few days before his death Koehler made his last will and testament, by which he directed that all of his just debts should be paid out of the proceeds of the life insurance policy.

The plaintiffs claim that they were entitled to all of the money. The five children by the first marriage claimed that they were entitled to share in the distribution. Frank Hale, the child of Maglien Koehler by her first husband, claimed that he was entitled to a share, and the executor of the last will and testament claimed that he was entitled to the money by virtue of the will. The court held that the whole of the proceeds should be paid to Maglien Koehler, the widow, and to Robert Koehler, the child of the second marriage. Frank Kale and the executor did not appeal, and the question to be determined is whether the policy should be construed to be for the benefit of the widow and all of the children of the deceased, or for the exclusive benefit of the widow and her child, the issue of her marriage with the deceased.

It appears from the record that all but one of the children by the first marriage were adults at the time the policy was procured. Some of them were married. But it does not appear, by the will or otherwise, that deceased at any time made any advancements to his elder children. It is not shown what property he owned at his death, nor at any other time. By his will he gave to his wife eight acres of land and one-third of all his other property, and divided the residue among the five children by his first wife, and Frank

Kale, the child of his wife by her first marriage. If there is anything to be gathered from the will as to the intention of the deceased, it is that the proceeds of the policy should be used for the benefit of his wife and his children by his first marriage, and Frank Kale, his step-son. It would have this effect, because, by discharging the indebtedness with the avails of the policy, the amount to be distributed to the devisees would be increased.

It is conceded that the provision of the will directing the avails of the policy to be used in discharging the indebtedness is inoperative, and as the policy was written more than six years before the will was made, the provisions of the will can be regarded as of very little consequence in determining who should be designated as beneficiaries under the policy. Indeed, there is nothing in the record to aid in the construction of the policy, and it must be construed by the language employed in the instrument. It provides that the proceeds "shall be paid to his wife, Maglien Koehler, and children." If we were to construe these words as meaning Maglien Koehler and her children, it would include, not only her child by her second marriage, but it would also include Frank Kale, her child by her first marriage. Such a construction cannot, we think, be the true one. It is not to be supposed that the deceased intended at that time to make Frank Kale the object of his bounty to the exclusion of his own children. The word "their" cannot be held to be the proper one to designate the children, because it is an improper form of expression. In order to sustain the interpretation of the circuit court, it is necessary to make the instrument read as follows: "to his wife, Maglien Koehler, and her children by him." We do not think this is the plain and natural construction of the language. We think it should be to his wife and his children. This, it appears to us, is not only the plain and obvious construction, but it accords with the grammatical sense of the words. If the words were, "his wife and children," there would be no doubt that the meaning would be his wife and his children. The name of the wife, Maglien Koehler, is thrown in as descriptive of the person, and not as designating whose children are intended.

Of course we can have no aid from adjudged cases in determining the question. We think that all of the children of the deceased should be included in the distribution.

Reversed.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Clinton County.*

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LONG

vs.

BEEBER, RECEIVER LYCOMING FIRE  
INS. CO.\*

Where a tenant, without the knowledge or consent of his landlord, performs an act which increases the insurance risk on the premises held by him, contrary to the stipulation of the policy; *Held*, That the fact that the act was that of the tenant, and even unknown to the landlord, was no excuse for the infringement of the covenants in the policy, and that the latter could not recover against the company.

The question whether the temporary use of a steam thresher did increase the risk was properly left to the jury.

This was an action to recover on a policy of insurance. The plaintiff proved on the trial that the buildings insured, the barn, wagon shed, corn cribs, and pig pen were wholly destroyed, and the dwelling-house damaged, on the 21st of September, 1880, by a fire, the cause of which was not known; that the dwelling-house was damaged to the extent of \$10, and that the barn was of the value of \$2,000, and the other buildings, wholly destroyed, of the value of \$800, at the time of their destruction. He further proved that he had duly notified the company and made the requisite proofs of the loss, and therefore he claimed to recover \$1,510, with proper interest, and rested. To avoid a verdict for any part of the plaintiff's demand, the defendant offered in writing to prove that the said fire

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\* Opinion filed, May 26, 1885. From *Pittsburgh Legal Journal*.

on the 21st of September, 1880, which caused the damages the plaintiff seeks to recover, originated from a portable steam engine employed on that day in driving a threshing machine, located in the barn, and that it increased the risk of fire thereto; that the engine was used by the authority and consent of the plaintiff or of the tenant in possession of the insured premises; that prior to that time no steam power had been used about said buildings or in the neighborhood of the same, for threshing or other farm purposes, and the defendant stated that the purpose of the evidence offered was to show that a part of the first section of the conditions annexed to the policy had been violated, and that therefore there could be no recovery; and in stating what that part is, words are joined together that have not such collocation in the section. The part of said section claimed by the defendant in the offer of evidence to have been violated by the plaintiff, quoting from the defendant's written offer, is as follows: "Or if the above-mentioned premises shall be occupied or used so as to increase the risk, \* \* \* or if the risk be increased by any means whatever without the assent of this company indorsed hereon, \* \* \* this policy shall be void."

J. R. YOUNGMAN and CLINE G. FURST, *for Plaintiff in Error.*

JESSE MERRILL and H. W. WATSON, *Contra.*

GORDON, J.

It is a very plain proposition, and one that ordinarily will not be disputed, that where a man makes an agreement with another, he should himself comply with its terms and conditions, if he would insist upon a compliance on part of him with whom he has contracted. Following a rule of this kind, it was held in the case of McClure vs. Watertown Fire Insurance Co., 9 Norris, 277, that when a condition in a policy is unambiguous, the insured cannot avoid a compliance with its terms by showing an honest though unsuccessful effort to comply therewith. In the case in hand there can be no doubt that the condition, upon the breach of which the defense was rested, was both reasonable and unambiguous. The company, for a fixed price, insured the building as it was at the date of the policy. It took upon itself that hazard and none other; and to avoid all dispute as to what it did insure, the condition was introduced that if the risk was increased by the erection or occupation of neighboring buildings, or by any means whatever, without the assent of the company, the policy should be void, and, subject to this condition, the plaintiff accepted this policy. There is no doubt about the just and bind-

ing character of this contract, and if the insured did in fact, without the assent of the insurer, either by himself or tenant, do anything to increase the risk, the contract was violated, and he must bear the consequences. Whether the risk of the fire was increased by the temporary use of the steam thrasher, at the barn, was a question properly submitted to the jury, and of that submission there can be justly no complaint. The argument, however, is, that with the use and employment of this steam engine the plaintiff had nothing to do, but that it was hired and used, without his knowledge and assent, by Solomon Tyce, his tenant. But we do not understand that the indiscretion of Long's tenant was one of the risks which the defendant took upon itself, and, if not, we cannot see how it can be made liable therefor. In this particular the case is very like that of *Diehl vs. Adams County Mutual Insurance Co.*, 8 P. F. Smith, 443. In that case the tenant, without the acquiescence or assent of his landlord, had increased the risk of the insured premises by the erection of steam works on a public alley adjacent thereto; held, that the fact that the erection was by the tenant was no excuse for an infringement of the covenants in the policy; that the possession of the tenant was the possession of the lessor; that he continued to be the insured party, and that the covenants he entered into when his property was insured continued, whether he occupied it personally or by his tenant. This case is so nearly like the one in hand that the one may be regarded as ruling the other. The principal difference is, that in the one the erection was permanent, but was not the cause of the fire which destroyed the insured building; in the other the erection was temporary, but caused the loss. Now, let it be that this temporary use only suspended the policy during the time the thrasher was in operation, yet, as the loss occurred during that time, the effect is the same as though the objectionable structure had been permanent. Nor does the landlord's knowledge of the act of the tenant form a material element of the case. As we have seen from the case above cited, the violation by the tenant is legally a violation by the lessor. Furthermore, the condition is not limited to an act personal or permissive on the part of the insured, but the provision is that the premises shall not be occupied or used so as to increase the risk, and it therefore became Long's duty to see that they were not so used.

The judgment is affirmed.

## SUPREME COURT OF CALIFORNIA.

TROJAN MINING COMPANY.

vs.

FIREMEN'S INS. CO., OF BALTIMORE,\*

A provision in a policy of fire insurance requiring the assured to employ a watchman to be in and upon the premises, day and night, during such time as the insured works were idle, is not complied with if such watchman, during the night, slept in a building located across the road from the insured premises, and about one hundred feet distant therefrom. Such result follows, although the watchman kept a watch-dog in the insured building, which had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached.

In a complaint on such policy an allegation that a watchman was employed by the plaintiff in and upon the premises day and night, and was upon the premises at the time of the fire, is sufficiently denied by an answer, which denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire, and for more than two hours prior thereto, no watchman was in and upon the premises.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

GEORGE W. TYLER, *for Appellant.*

FOX & KELLOGG and T. C. VAN NEEB, *for Respondent.*

*The Court.*

Action on a fire insurance policy. The policy contained the following clause :—

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\* Opinion filed, May 14, 1885. From *West Coast Reporter*.

"It is agreed and understood that during such times as the above works are idle, a watchman shall be employed by the assured, to be in and upon the premises day and night."

The allegation in the complaint on that subject is as follows:—"That at the time of such fire, and for some time prior thereto, the works of said corporation, so assured, as aforesaid, were idle, but during all said time a watchman was employed by plaintiff in and upon the premises day and night, and said watchman was upon said premises at the time of said loss and damage, as aforesaid."

The denial is as follows: "And defendant denies, and says it is not true, as alleged in said complaint, or at all, that during all the time the works of said corporation were idle, as alleged in said complaint, a watchman was in and upon the premises day and night."

In the answer there is also an allegation as follows: "That at the time said fire occurred, and for more than two hours prior thereto, no watchman was in and upon the premises upon which said works, insured as aforesaid, were situated."

It is contended by plaintiff, that the allegation of the complaint as to the watchman is not denied. The complaint states that a watchman was employed by plaintiff in and upon the premises day and night, and was upon the premises at the time of the fire. The answer denies that a watchman was in and upon the premises day and night, and avers that at the time of the fire, and for more than two hours prior thereto, no watchman was in and upon the premises. The denial seems to us to be plain and unequivocal. The appellant urges that by the terms of the policy it was to employ a watchman to be in and upon the premises, and if the watchman staid away, the insurer is not exonerated, under section 2,629, civil code. If there is any difference in the meaning of the words used in the policy and those used by the pleader, the latter seems to have attached to them the meaning that the watchman, employed by the plaintiff, was in and upon the premises day and night, not that he was employed to be there and neglected his employment; and moreover, the plaintiff alleged that he was there at the time of the fire; and thus the issue was presented as to the fact whether or not the watchman was there. On this subject the court found as follows:—

"That during the time that said premises were so idle and unoccupied, plaintiff failed to and did not keep a watchman in and upon, or in or upon, said insured premises day and night. That no watch-

man was in and upon, or in or upon, said insured premises nightly from and after the hour of 10 o'clock, or thereabouts, until an early hour of each morning thereafter. That no watchman was in and upon, or in or upon, said insured premises between the hours of 10 o'clock p. m., or thereabouts, on the evening preceding the fire alleged in the complaint of plaintiff, and the hour when said fire occurred. That a watchman employed by plaintiff to watch the insured premises slept nightly in a small building located across the road from said insured premises, and from one hundred to one hundred and twenty feet, or thereabouts, distant therefrom. That said building was owned by plaintiff, but was situate upon ground not owned by plaintiff. That the watchman so employed as aforesaid, kept a watch-dog in the insured building, which had the whole range of the building on the inside, and was accustomed to bark loudly when any stranger approached said building."

The evidence is not before us. The findings respond to the issues, and clearly show that plaintiff was not entitled to recover.

It is unnecessary to notice the other points presented, as the above disposes of the case.

The judgment is affirmed.



## SUPREME COURT OF IOWA.

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*Appeal from Hardin Circuit Court.*


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UNDERWOOD

vs.

IOWA LEGION OF HONOR.\*

Where the assessment in a benevolent order was not made in the manner required by the constitution and rules, on a subordinate lodge, a notice from the secretary of the latter, calling for the payment of a death-claim for which the assessment should have been made, is not binding upon the members, and a failure to respond to such notice will not forfeit the rights of the member.

A member is not bound by usages and customs of the order in regard to assessments, of which he is not shown to have had knowledge.

The defendant is a corporation existing and doing business under the laws of Iowa. The plaintiff, in her petition, claimed that defendant obligated itself to pay her \$2,000, as part of a beneficiary fund, upon the death of David Underwood. Trial to the court, judgment for the plaintiff, and defendant appeals.

J. B. YOUNG, *for Appellant.*

STIVERS & LOUTHAM, *for Appellee.*

SEEVERS, J.

The business of the defendant is life insurance. In pursuance of certain rules and regulations it bound itself to collect and pay a specified sum upon the death of each member of the order. The defendant is designated as the "Grand Lodge," and there are sub-

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\* Decision filed, April 24, 1888.

ordinate lodges. David Underwood was a member of one of such subordinate lodges, designated and known as "Doran Lodge No. 105." The defendant issued to him a certificate of membership which entitled the plaintiff to the sum of \$2,000 upon his death, provided that at such time he was a member of the order, and had complied with "all the laws, rules, and regulations thereof." To pay death-losses the members of the order were from time to time assessed and required to pay a stated sum. Upon their failure to do so they ceased to be members, and were not entitled to any of the benefits of the order, unless reinstated as provided by the rules and regulations of the order.

It is conceded that the constitution, rules, and regulations constitute a part of the contract of insurance, and the right of the plaintiff to recover depends upon the question as to the proper construction thereof. Two members of the order died, and, as the defendant claims, an assessment therefor was made on David Underwood on the first day of September, 1881, which he did not pay, although duly notified, and thereby he ceased to be a member, and was not entitled to the benefits of the order. The assessment in question was made by the defendant in the subordinate lodge of which David Underwood was a member, and the subordinate lodge was directed to remit to the proper officer a specified sum for each member, and "immediately make an assessment on all your members of that date." The subordinate lodge did not make such assessment, but the secretary thereof notified David Underwood that a member of the order, named Hess, had died, and he was directed to remit the amount required to pay such loss, and that if he failed to do so he would stand suspended. There is some question when this notice was sent to Underwood. The defendant claims it was in September, 1881, while the plaintiff claims it was in 1882, long after the death of Underwood. Conceding it was at the time claimed by the defendant, we are unable to find any evidence in the abstract that the defendant ever made any assessment for the death of Hess. The assessment made by the defendant was for other and different persons.

The abstract is confused in this respect, and we are unable to determine what the truth is. It is evident, we think, that unless the defendant made an assessment on the subordinate lodge for the death of Hess, then the act of the secretary in notifying Underwood of such death, and requiring him to pay, had no effect on the rights of the parties. But, be this as it may, the constitution provides "that a named officer of the defendant shall notify each subordinate

lodge of the death of each member, and require it to forward the grand treasurer the requisite amount of money to pay the loss, and the subordinate lodges are required to make an assessment upon each member of one dollar each for each valid certificate at the date of death of the member upon which such assessment is made." This provision constitutes a part of the contract of insurance, and Underwood was not required to pay a death-loss until the subordinate lodge, of which he was a member, made an assessment on him therefor. Until such assessment was made Underwood was entitled to all the rights and privileges of the order.

Counsel for the defendant insists that, under the usages and customs of the order, the assessments made on the subordinate lodges, and the notice thereof, should be regarded as a compliance with the constitution; and he offered to introduce evidence to establish such fact, which the court refused to receive. It was not proposed to prove that Underwood had knowledge of such custom, and we think that he was not bound thereby, but had the right to rely on the provisions of the contract of insurance. The court, therefore, did not err in the rejection of the proposed evidence. It is deemed proper to state that on the day prior to the death of Underwood, a friend, for him, paid all that was due the order from him, which the defendant received and yet retains, but claims that such amount was received by mistake, and it has credited Doran Lodge with such amount as being by it overpaid. But neither the defendant nor Doran Lodge has offered to refund said money. To say the least, it is doubtful if the order can retain this money and yet refuse to pay the insurance to the plaintiff.

*Affirmed.*

## SUPREME COURT OF PENNSYLVANIA

*Error to the Court of Common Pleas of Northampton County.*

APPEAL OF THE SUSQUEHANNA }

MUTUAL FIRE INS. CO.\* }

A premium-note is not an absolute obligation until assessment has been made and notice given. Attachment therefore cannot be maintained for an unpaid assessment of which no notice had been given.

GREEN, J.

We think the absence of notices of assessments to the insured was fatal to the cause of action in this case, and therefore the judgment must be affirmed. The proceeding is adverse. The claim is founded upon a contract, and a recovery by judicial decree must be in accordance with the terms of the obligation sought to be enforced. The premium-note is not an absolute obligation, but only an engagement to pay in such portions and at such times as the directors may, agreeably to the acts of Assembly and the by-laws require. The fifth paragraph of section 31 of the by-laws provides that, whenever an assessment is levied, the secretary shall give notice to the policy-holder of the amount due and the time of payment. It is plain, therefore, that there is no liability to pay anything on the part of the insured until an assessment has been made and notice has been given him of the amount due, and the time when it is to be paid. Nothing of that kind was done in this case, either prior to the attachment or to this suit. As the defend-

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\* Decision rendered, Oct. 6, 1884.

ant could not know what amount he was to pay, or at what time, without a notice; the terms of his contract imposed no obligation upon him, and no adverse legal proceeding could be founded upon such an imperfect engagement. He not only violated no duty, but the duty did not exist until the stipulations upon which it was to arise had been complied with. We cannot regard the attachment as a substitute for the notice, it is only another form of judicial proceeding, which is as much in want of a compliance with the ordinary terms of the obligation as is the present suit. As this difficulty is fatal to the cause of action it is not necessary to consider the other matters arising in this record.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Adams County.*

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JACOBS

VR.

SUSQUEHANNA MUT FIRE INS. CO.\* )

In a suit by a mutual assurance company against one of its members, for an assessment, defendant alleged that the assessment should be upon the basis of \$30 cash, as that was the way the agent had agreed on.

*Held*, That this verbal agreement with the agent was not effective, as the application contained a positive stipulation that the company was not bound by any statement unless inserted in the application in writing.

J. C. NEELY, for Plaintiff in Error.

DAVID WILLS, for Defendant in Error.

GREEN, J.

The rejected offers of testimony in this case, were practically to prove by the verbal declarations of the company's agent a contract different from the actual written contract of the parties. It is sought to sustain the offers by the theory that the declarations constituted a fraud, by means of which the defendant was induced to enter into the contract. But they do not come within that category. It is admitted that the assessments in question were made in strict accordance with the plain terms of the application and policy and the by-laws of the company. These constitute the entire contract. It was offered to prove that the agent told the defendant that the assessments would be made upon the basis of the cash premium paid when the

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\* Decision rendered, October 6, 1884. From *Legal Intelligencer*.

insurance was obtained, \$30, and also that the assessments previously made had never been more than 80 to 100 per cent, and would not be that much in the future. As to what the assessments might be in the future, the agent's statement could only be an opinion, and it was not alleged or offered to be proved that what they had been in the past, was falsely stated. The important element in the offer was that it was agreed that assessments to be made upon this policy should be upon the basis of the \$30 cash premium. But this was simply an offer to prove a verbal agreement by the agent which was different from the express terms of the written contract which was executed and accepted by the insured. Such a verbal agreement is not a false representation. It is simply an agreement of a different tenor from the one actually made. Of course, this was not an act within the authority of a mere agent, even if there had been no express restriction upon his powers. But here the application contained a positive stipulation that the company should not be bound by any act or statement, made to or by the agent, restricting its rights or varying its written or printed contracts, unless inserted in the application in writing. This is a proper provision, and is the law of the parties, which we have no power to alter.

The portion of the offer which relates to the attempted surrender and cancellation of the policy, contains no offer to prove any authority in the agent to receive and cancel the policy, and was therefore inadmissible. A power to receive applications, premium-notes and cash premiums, does not include a power to cancel policies. Nor is the offer helped by showing that the policy was sent by the agent to the company as a surrendered policy, unless the company accepted it as such, and such proof is not embraced in the offer.

Judgment affirmed.

## LOWER COURT DECISIONS.

### BENEVOLENT ASSOCIATION.—MODE OF CHANGING BENEFICIARY.

*St. Louis Court of Appeals.—Appeals from Circuit Court, St. Louis.*

JOHN R. COLEMAN and PATRICK RYAN, *Respondents.*

*vs.*

SUPREME LODGE KNIGHTS OF HONOR, *Appellant.\**

Where the charter of a beneficial association authorizes the payment of a sum of money from its benefit fund upon the death of a member, provided he "has complied with its lawful requirements," the association may make any reasonable requirement as a condition precedent to paying such benefit to any one.

A requirement by such an association, as to the form in which the member shall designate or change his beneficiary, is a lawful and reasonable requirement, and is within the provision of such a charter.

The establishment by the association of a specific form or mode of changing his beneficiary by the member is exclusive of other modes.

The rules and regulations of a mutual beneficial association become a part of the contract made with every person who joins the association as a member, and the members are all bound by such regulations.

An attempt made, by a member of such an association, to change his beneficiary in a mode not provided for by its laws, confers no rights on the persons thereby designated, and may properly be disregarded by the association.

Suit brought to recover the sum of \$2,000,—claimed as a benefit, upon the death of James O'Gallagher, formerly a member of the Order of Knights of Honor.

JAY S. TORREY and JAMES O. PIERCE, *for Appellant.*

M. KINEALY, *for Respondent.*

ROMBAUER, J.

The defendant corporation is a benevolent association, and the plaintiffs, claiming to be the assignees of the benefit of \$2,000 to

\* Opinion filed, June 2, 1885.



which a deceased member was entitled under the charter, constitution, and by-laws of the association, sued the corporation for that amount, and recovered judgment in the court below.

The provisions of the defendant's charter, constitution, and by-laws, so far as they affect the merits of this controversy, are as follows:—

The charter provides that the corporation may establish a widows and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member of the corporation, who has complied with its lawful requirements, a sum not exceeding \$5,000 shall be paid to his family, or as he may direct.

The constitution adopted under the charter provides that, out of the widows and orphans' benefit fund, on the satisfactory evidence of the death of a member of this corporation, who has complied with all its lawful requirements, a sum not exceeding \$2,000, shall be paid to his family, or as he may direct.

The by-laws provide: "Each applicant shall direct in his application to whom he desires his death benefit paid, which shall be subject to such future disposal of the benefit as the member may thereafter direct, in accordance with the laws of this order, and such direction shall be entered in the benefit certificate.

"A member may, at any time while in good standing, surrender his benefit certificate, which, together with a fee of fifty cents, shall be forwarded by the reporter of his lodge, under seal, to the supreme reporter, who shall thereupon cancel the old certificate and issue a new one in lieu thereof to such member, payable as he shall have directed.

"The supreme reporter shall return to the reporter of the subordinate lodge, a benefit certificate signed by the supreme dictator and himself, and made payable as the member shall have directed in his application; and the subordinate lodge shall enter on record the number thereof; provided, no benefit certificate shall be re-issued, except as herein provided, unless satisfactory proof of loss of the former benefit certificate is furnished the supreme reporter. When a second certificate is issued, the first one shall be void."

In this case the deceased member took out a benefit certificate, and delivered it to his wife. Shortly prior to his death, desiring to change the disposition made of the benefit, he gave written notice to the officers of the subordinate lodge of which he was a member. In that notice he stated that he surrendered the former certificate,

and requested that a new one be made out and delivered to him, payable to plaintiffs. The old benefit certificate remained in possession of his wife, he never demanded it of her, his offer to surrender was not accompanied with the certificate itself, and there is no pretense that it was lost. The defendant paid to the widow, who held such certificate, prior to the institution of this suit, the \$2,000; whereupon the widow surrendered the certificate to the corporation.

Upon these facts appearing, the trial court declared that plaintiff cannot recover unless the deceased, in accordance with the laws of the corporation, rescinded his direction to defendant to pay the fund accruing on his death to his wife, and directed payment thereof to plaintiff.

As the court found for plaintiffs notwithstanding this declaration, its finding can be justified only on the following grounds:—

1. That the by-laws of the corporation, providing in what manner a member shall direct to whom his benefit is to be paid, are invalid.

2. That it was not the intention of the corporation to prevent by its laws other methods of disposition than those therein provided for.

The charter of the corporation provides that the benefit should be paid, upon the member's decease, provided he has complied with the lawful requirements of the corporation, to his family or as he may direct.

It does not purport to describe what are lawful requirements, nor does it purport to describe in what manner the direction shall be given. The corporation was left at liberty, as long as it did not violate the objects of its charter in so doing, to make any reasonable requirement as a condition precedent to paying the benefit fund to any one, and was further authorized to declare in what manner the member should direct the payment to be made, provided such manner was not unreasonable and not designed to defeat the manifest objects of the corporation.

In the whole range of the adjudged law nothing can be found to contravene this position, while the cases asserting it are numerous.

In *Osceola Tribe vs. Schmidt*, 47 Md., 98; the appeal was upheld which made the decision of the lodge conclusive as to members' rights to receive any benefits.

In *National Mut. Aid Society vs. Lupold*, 101 Penn. St., 111, the charter provided that if a member died within the period named in

his certificate, the amount shall be payable to his legal heirs, or any person designated in the certificate, or by his will. The certificate issued, provided among other things that it should be transferred and assigned only by and with the consent of the association indorsed thereon. The member indorsed upon his certificate a direction to change the beneficiary from himself to Lupold. No consent of the association was shown to the assignment, and it was held invalid as against the company.

In *Highland vs. Highland*, 13 Bradwell, 510, a certificate issued by this corporation was the subject-matter of controversy. On the face of the certificate there was a direction that the benefit be paid to Jane Highland, the member's sister. The member subsequently married and shortly before his death wrote to his wife, "I want you to have all my effects, everything. Tell my sister, if you ever hear from her." The certificate was never delivered to the sister, but was found among the effects of the deceased member. The widow claimed the benefit, and upon interplea between the sister and widow, the court decided that the sister was entitled to it.

This case was decided in 1883, presumably under the same charter; both parties contended that the corporation had power by its constitution and by-laws to prescribe in what manner a member should direct to whom his benefit was to be paid. The court in deciding this case said: "Having elected to direct on the face of the certificate, to whom the money should be paid, it must be paid as directed, unless such direction has been changed in the mode prescribed by the laws and constitution of the order."

The defendant's charter authorizes it to institute grand and subordinate lodges under such rules and regulations as the corporation may indicate, and confers upon it powers to create, hold, and disburse the funds named in the objects of the corporation, for promoting benevolence and relieving the sick and distressed, under such regulations as it may deem necessary to adopt. In this regard, defendant's charter is not materially different from the charters of other corporations whose regulations of a similar character have been upheld as valid. The provision that the benefit fund should be paid as the members direct is not at all inconsistent with the exercise of a power by the corporation, prescribing how the members should direct, provided the rule established by the corporation for that purpose be reasonable.

Nor can we see how the member, or those claiming under him, can be heard to assert that the rules established by the corporation in

that regard were unreasonable: The member is a voluntary party to the compact, and as such bound by it, unless it is in derogation of some charter right, or is otherwise invalid as contravening some paramount provision of the law. The rule may be void as to the strangers or members who do not assent to it, and yet good as a contract between members of the corporation who do assent to it. The member in this instance, by taking the benefit certificate as under the constitution and by-laws of the corporation and containing upon its face a direction to whom such benefit shall be paid, must be held to have assented to all these regulations, and they became as much part of his contract as if fully set out in the certificate itself.

We are referred to the case of Expressmen's Aid Society vs. Lewis, 9 Mo. Appeal, 412, by appellant as corroborating the view herein indicated, and by respondent as sustaining the view held by the court below. That case, however, was essentially different from the case now under consideration, and the decision there has no bearing on the present controversy.

In that case the wife of the member was the appointee. She died before him. The contest was between the representatives of the husband and those of the wife, who interpleaded for the fund voluntarily paid into court by the corporation. The constitution and by-laws of the society provided that the fund should be paid to the legal representatives of a deceased member upon the death of a beneficiary named prior to the death of the member. The court decided that the representatives of the husband were entitled to the fund, and ordered a distribution in strict conformity with the by-laws of the corporation.

We see no ground upon which the rules invoked by defendant in this case can be declared illegal. Nor do we perceive how the judgment of the trial court can be sustained on the ground, that although the provisions of the constitution and by-laws prescribe in what manner a member should direct his benefit to be paid before the corporation can be required to pay it, yet, that the manner thus prescribed was not exclusive of any other manner which the member should see fit to adopt himself. That construction finds no just explanation in anything contained in the instrument before us. It must be assumed that when the corporation framed a set of rules, providing in the most direct manner for the distribution of this fund and for the rights of beneficiaries, the manner thus prescribed was exclusive of all others. The expression of one thing is necessarily the exclusion of another and different thing. Another conclu-

sion on the subject would lead to the most interminable confusion in the matter applicable to the distribution of such funds and fritter away funds created for the benefit of widows and orphans, in the expenses of endless litigation.

As there is no controversy concerning the facts in this case, and as under the views herein expressed, the trial court upon the uncontested facts should have entered judgment for defendant, its judgment is reversed and judgment will be entered for defendant in this court. All the judges concur.

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**NOTE.**—In the following-named cases, in addition to those cited in the foregoing opinion, it has been held that both in designating and changing beneficiaries in a mutual benefit society, the rules prescribed must be observed: *Hellenberg vs. I. O. B. B.*, 94 N. Y., 580; *Vollman's Appeal*, 92 Penn. St., 50; *Greeno vs. Greeno*, 23 Hun, 478; *Eastman vs. Relief Asso.*, 20 Cent. L. Jour., 268.

2. A change made in accordance with the prescribed rules divests to the former beneficiary of all interest in the fund: *Gentry vs. Supreme Lodge*, 20 C. L. Jour., 393; *Durian vs. Central Verein*, 7 Daly, 168; *Tennessee Lodge vs. Ladd*, 5 Lea, 716; *Supreme Lodge vs. Martin*, 12 Ins. L. Jour., 698.

3. The rules and regulations of such a society bind the members as part of their contract: *Knights Golden Rule vs. Ainsworth*, 71 Ala., 436; *Supreme Lodge vs. Grace*, 60 Texas, 569; *McMurray vs. Supreme Lodge*, 13 Ins. Law Jour., 569; *Karcher vs. Supreme Lodge*, 13 Ins. Law Jour., 786.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### ACTION.

§ 139. *LIFE.—In case of Foreign Corporation.—Domicile.*—A corporation has its domicile, as to debts contracted by it, in the State by which its charter was granted; but it may subject itself to suit in another State, by the appointment of an agent there, upon whom, as a condition of doing business there, process may legally be served. A person domiciled in Alabama having here obtained a policy of insurance on his own life from a corporation chartered in New York, through an agent having an office and doing business here, and having his domicile here at the time of his death, an executor appointed here may maintain

an action on the policy in the courts of Alabama, notwithstanding the grant of administration in New York.

*Equitable Life Ass'e Society vs. Vogel.*

Decision rendered December Term, 1884.

ALA. S. C.

AGENT.

§ 140. FIRE.—*Evidence of Embezzlement by.—Practice.*—The statute, No. 1, s. 17, acts of 1874 (R. L., s. 3,616), providing, that, if an insurance agent appropriates to his own use any money received by him as such agent, and does not pay over the same, etc., he shall be guilty of larceny, is constitutional. The respondent and one B. were insurance agents and partners. The indictment made no mention of the firm, but was found against the respondent alone in relation to business done in the name of the firm. *Held*, That a copy of the commission, the original having been lost, appointing the respondent and his partner agents, was admissible to prove the agency charged. In order to render an entry made by a deceased person admissible, it must be proved, that it was in his handwriting, that it was a part of his duty to make it and in the regular course of business, and that he was dead. One P. was a sub-agent of the insurance firm or company to which the respondent belonged. A copy of P.'s account, showing the transactions between him and the firm, without proving the loss of the original book, was not admissible for any purpose; and the error can be taken advantage of by merely objecting to its admission, without stating a reason. An assistant cashier cannot testify to entries made in the bank books prior to his employment, where it did not appear at what time they were made, or who made them, or in whose handwriting, or that he had any personal knowledge of them. The respondent as an insurance agent was charged with the larceny of money from a foreign insurance company; *Held*, That it was not necessary for the prosecution to prove that the company was legally doing business in this State. The neglect or refusal to pay over the money within thirty days after notice constitutes a crime. The sheriff having the respondent in custody, duly authorized by an agent of the company, could give the requisite notice; no particular sum need be named, nor the authority to give the notice be stated. There was but one offense, although several

premiums were collected. It was not important to inquire whether the respondent's partner had appropriated any of the insurance money to his own use. The court charged correctly as to the respondent's commingling the money with his own. The respondent may be guilty under this statute, although he may not have had a fraudulent and felonious intent to steal or embezzle. It is the duty of the court to charge fully upon all the points of law. All rights can be saved without any requests. Requests may be of great aid to the court, if precise and certain; but when improperly drawn, they should not be considered. It was in the discretion of the court to allow the prosecution to examine a witness after the respondent had been directed to put in his defense; and especially so, as the respondent had no testimony to offer, and notice was given when the State rested that it was expected to use the witness. The better rule is to prohibit it entirely; but it is a matter wholly in the discretion of the trial court.

*State vs. Hopkins.*

Rep'd Jour'l. p. 657

Vt. S. C.

#### AGENT.

§ 141. LIFE.—*Settlement of Commissions.—Verdict.*—Where there is a dispute as to the amount of an agent's claims for commissions, a settlement by way of compromise is final. But if there is no dispute, a settlement is not final. A verdict will not be disturbed where the evidence is conflicting.

*Cresney vs. Western Mut. Aid Society.*

Rep'd Jour'l, p. 660.

IOWA S. C.

#### ARBITRATION.

§ 142. FIRE.—*Construction of Policy as to Request for*—A policy of insurance provided—1st, That arbitrators are to be chosen at the request of either party in writing, and, 2d, That no suit shall be commenced until an award shall be obtained fixing the amount of the claim "in the manner hereinbefore provided." Held, That the one clause must be read with the other, and if there was no written request for arbitration given, it will be presumed that it was waived, and a suit at law may be brought without first referring it to arbitration.



Mentz vs. Armenia Ins. Co., 29 P. F. S., 478; Ins. Co. vs. Morse, 20 Wall. 445; Flaherty vs. Ins. Co., 1 W. N. C., 852; Ins. Co. vs. Steiger, 13 Ins. L. J., 546.

*Wright vs. Susquehanna Mut. F. Ins. Co.*

Rep'd Jour'l, p. 718.

PA. S. C.

### CANCELLATION.

§ 143. FIRE.—*Effect of Assignment on Liability for Unearned Premiums.*—Defendant insurance company issued two policies for the period of five years to M., each providing for cancellation at his pleasure, and stipulating against other insurance. At the end of fifteen months, M., desiring to insure the property in another company, delivered his policies in defendant company to C., with an indorsement upon each in these words: "For value received, I hereby assign to C. the unearned premium under this policy, also this policy for cancellation, and authorize him to collect such unearned premium." Eight days later, C. tendered the policies to defendant for cancellation, but as a dispute arose as to the amount of the unearned premium they were returned to him without cancellation, and he brought suit to enforce payment of the amount claimed. *Held*, (1) That the election of M. to cancel the policies, no notice being given to defendant, and no request being made by him for cancellation, did not create a liability to pay the unearned premiums; and (2) that the policies had been avoided by M. by a violation of their condition in obtaining the insurance in the other company.

Waller vs. Northern Ins. Co., 19 N. W. Rep., 865.

*Colby vs. Cedar Rapids Ins. Co.*

Rep'd Jour'l, p. 698.

IOWA S. C.

### CAPITAL STOCK.

§ 144. FIRE.—*Subscriptions in case of Increase of.*—Section 27 of the supplemental Corporation Act of May 1, 1876, does not authorize the issuing stock to be paid for at par and requiring an additional bonus of the same amount to be paid in cash into the treasury of the company. The act requires that the increased shares shall be allowed pro rata to the stockholders of

the company according to their interest. The insurance company allowed its stockholders to subscribe for new shares on payment of \$10—the par value of the old stock—and \$10 additional to go to the surplus fund of the company. *Held*, That this was unauthorized by the Act of 1876. The Act of June 29, 1881, P. L., 121, does not apply to this case, as it was passed subsequently to the action of the company making the increase.

*Cunningham vs. Ins. Co. of N. A.*

Rep'd Jour'l, p. 693.

PA. S. C.

### DIVIDEND.

§ 145. *LIFE.—Liability of Company to an Accounting*—Where a demurrer to the whole bill has been overruled and leave given to answer, the defendant cannot a second time avail himself of the demurrer. The bill alleged the issue of a policy on the “reserve dividend plan” and also certain instructions to the agent explaining the plan upon the faith of which representations the policy was accepted. The issue of such instructions was denied by the company. *Held*, That the company was not bound to answer interrogation regarding the meaning of the term “reserve dividend.” Jurisdiction as to how far a company must account for the management of a reserve dividend fund is exercised largely as a matter of discretion.

Northeastern Ry. Co. vs. Martin, 2 Phil., 758; Southeastern Ry. Co. vs. Brogden, 3 Macn. & G., 23; Foley vs. Hill, 2 H. L. Cas., 28; Anderson vs. Noble, 1 Drew., 143; Bliss vs. Smith, 34 Beav., 508; Pike vs. Dickinson, L. R. 7 Ch. App. Cas., 61; Mackenzie vs. Johnson, 4 Madd., 373; Phillips vs. Phillips, 9 Hare, 471; Shepard vs. Brown, 9 Jur. (N. S.), 195; Hemings vs. Pugh, id., 1,124; Makepiece vs. Rogers, 11 Jur. (N. S.), 314; Dinwiddie vs. Bailey, 6 Ves., 136; Moses vs. Lewis, 12 Price, 502; Story, Eq., § 458; Miller vs. Kent, 16 Fed. Rep., 13.

A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts as alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

Parties to a contract of life insurance do not contemplate that the policy-holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in his behalf. The contract is that the policy-holder shall have the benefit of such dividends as are appropriated, not such as the policy-holder or the court may think might have been discreetly appropriated by the company.

*Fuller vs. Knapp.*

Rep'd Jour'l, p. 677.

N. Y. U. S. C. C.

### INSOLVENCY.

§ 146. *LIFE.—Effect on Company's Deposits.*—Where a deposit of \$100,000 in securities is made by the company with the superintended of insurance, as required by §§ 8–10, of O. L., vol. 69, p. 152 (R. S., §§ 3,593, 3,595), such securities are held by him as security for policy-holders only, and not for the security of the general creditors of the company. Such a deposit does not change the character of such securities; and, subject to the rights of such policy-holders, such securities are also subject to the rights of the makers of the same. When such a company has become insolvent, and is dissolved, and a receiver is winding up the affairs of the company, if a part or all of such deposited securities be needed to pay such policy-holders, there should be collected the amount needed, if the securities are sufficient, to pay such claims; if the securities are not sufficient, the proceeds should be duly applied upon the claims of such policy-holders. After the claims of policy-holders are satisfied, the remaining securities are liable only to the rights of the company in such securities; and, as against the makers, the company had no rights in accommodation notes and mortgages given to such company for the purpose only of such deposit.

Wright vs. McCormick, 17 Ohio St., 86; Bell, Receiver, vs. Shibley, 33 Barb. (N. Y.), 610; Coope vs. Bowles, 42 Barb., 87; High Rec., § 201; Lincoln vs. Fitch, 42 Me., 456; Receivers vs. Patterson Gas Light Co., 3 Zab., 283; High Rec., § 205.

*Fulkenbach vs. Patterson.*

Rep'd Jour'l, p. 679.

O. S. C.

## INSOLVENCY.

§ 147. *LIFE.—Excuses Payment of Premium.*—A policy of insurance provided that it should be void for failure of insured to pay the stipulated premiums annually. *Held*, the company having become insolvent, insured was excused from paying subsequent premiums.

*People vs. Empire Mutual Life Ins. Co.*, 92 N. Y., 105.

*Jones vs. Life Association of America.*

*Rep'd Jour'l*, p. 653.

KY. C. A.

## INSURABLE INTEREST.

§ 148. *LIFE.—Of Son-in-law.*—A son-in-law, if not a creditor, nor legally liable for her support, has no insurable interest in the life of his mother-in-law.

*Stoner vs. Line.*

*Rep'd Jour'l*, p. 656.

PA. S. C.

## INTEMPERANCE.

§ 149. *LIFE.—Knowledge of Agent when not a Waiver.*—The fact that an assured, at the time of his insurance, was intemperate to such a degree as to impair his health, avoids the policy if the same contain a condition that if the party insured should become so far intemperate as to impair his health, the policy should be void; and the knowledge of such fact by the agent of the company, will not operate to estop it from relying upon the violation of such condition, as a defense to an action on the policy, or be regarded as a waiver thereof, if, at the time of the execution of the policy, the party in whose favor the same was issued also knew of such fact.

*Pomeroy vs. Rocky Mountain Ins. Co.*

*Rep'd Jour'l*, p. 703.

COL. S. C.

## LIEN.

§ 150. *MARINE.—For Unpaid Premiums.—Lex Loci.*—A maritime lien not recognized by the law of the place of contract on

which it is based will not be enforced elsewhere. An insurance company has no maritime lien upon the vessel for unpaid premiums.

Citing and discussing *De Lovie vs. Boit*, 2 Gall., 398; *Ramsey vs. Allegre*, 12 Wheat, 638; *The Kiersage*, 2 Curt., C. C. Rep., 424; *Vandewater vs. Hill*, 19 Howd., 8; *Gloucester Insurance Company vs. Younger*, 2 Curtis, 322; *Hale vs. Washington Insurance Company*, 2 Story, 176; *Dunlap's Admiralty Pr.*, 431; *Kent's Commentaries*, 270 (notes); *Benedict's Admiralty*, sec. 294, *Conklin's Pr.*, 13. *Dolphin*, 1 Flippin, 580; *Norwich and New York Transportation Company*, 17 Blatch., 321; *Thomson vs. Whitwell*, 21 Blatch., 45.

*Ins. Co. of State of Pennsylvania vs. Barge Wabaushene.*

Rep'd Jour'l, p. 716.

N. Y. U. S. C.

#### MUTUAL COMPANY.

§ 151. FIRE.—*When Equity will Relieve from Liability on Premium-notes.*—The statute provided that the members of mutual companies should be liable for such assessments by a receiver as were necessary, to pay all losses and expenses, but all the parties insured in a mutual company had agreed that their liability should be limited to the amount of their premium-notes. *Held*, That where the agreement had been entered into through a mistake of law equity would relieve against farther liability.

*Russell vs. Berry*, 51 Mich., 287; *Lycoming Fire Ins. Co. vs. Woodworth*, 83 Pa. St., 223; *Mitchell vs. Ins. Co.*, 51 Pa. St., 402; *Mundorff vs. Wickersham*, 63 Pa. St., 87.

*Maclem vs. Bacon.*

Rep'd Jour'l, p. 684.

MICH. S. C.

#### TITLE.

§ 152. FIRE.—*Insurable Interest in Case of Foreclosure.—Knowledge of Agent.—Reformation of Contract.—Vacant in Case of Elevator.*—The policy insured the K. elevator company, loss payable to W., administrator. The elevator had been sold under a decree of court and had been bought in by W. subject to redemption within a year. Prior to the fire the title had passed to W. through the failure of the elevator company to redeem. *Held*, That the interest of the company insured hav-

ing absolutely ceased, the policy became void. It appears, however, that the facts regarding the title had been fully explained to the agent who filled the policy, and he had agreed to insure the interest of W. *Held*, That a court of equity would reform the contract to agree with the understanding of the parties. *Held*, That where the agent knew the ground was leased, a policy provision rendering it void on that account was waived. *Held*, That where an elevator was being used at intervals and men were at all times around it, it was not vacant.

*Williams vs. North German Ins. Co.*

Rep'd Jour'l, p. 706.

Iowa U. S. C. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME COURT OF IOWA.

*Appeal from Polk Circuit Court.*

CRESSEY

vs.

WESTERN MUT. AID SOCIETY.\*

Where there is a dispute as to the amount of an agent's claim for commissions, a settlement by way of compromise is final. But if there is no dispute, a settlement is not final.

A verdict will not be disturbed where the evidence is conflicting.

Action on a written contract, whereby the defendant agreed to pay the plaintiff, its general manager, two dollars for "every certificate of membership issued, or that may be issued, by said society." Trial by jury, verdict for the plaintiff, judgment, and he appeals.

W. E. MILLER, W. S. DUNGAN, and WM. KENNEDY, *for Appellant.*  
BARCROFT & BOWEN, *for Appellee.*

SEEVERS, J.

The plaintiff introduced evidence tending to show that the amount due him under the contract was settled in August, 1881, and that

\* Opinion filed, April 21, 1885.

the defendant then agreed to pay the plaintiff \$2,862.08. The plaintiff concedes that he received \$2,100 of said sum. The defendant pleaded that the amount agreed upon was not due the plaintiff, but that the same was so agreed upon by mistake, and that afterwards a dispute arose as to said settlement, and that the plaintiff, by way of compromise, agreed to accept \$2,100 in full of the amount due him, and the same was paid by the defendant. The court instructed the jury, in substance, that if there was a dispute or controversy as to the sum due, and the plaintiff accepted \$2,100 in full payment of his entire claim, then he was bound by such settlement and could not recover; but, if there was no dispute or controversy, then the plaintiff was entitled to recover. No complaint is made of this instruction. The law of the case must therefore be regarded as settled, and the only question to be determined is whether the evidence supports the verdict.

Counsel for the appellant insist that the uncontradicted evidence shows there was a dispute and controversy, and counsel for the appellee insist that there was no material controversy, and as to whether there was or not, the evidence was conflicting. Under the contract, the plaintiff was entitled to recover two dollars for every certificate of membership. When the number of certificates issued was ascertained, the amount due the plaintiff could be readily known by a mathematical calculation. We have read the evidence introduced by the defendant with care, and find there is no evidence which tends to show that there was any mistake or controversy as to the number of certificates issued.

There is evidence tending to show that the amount agreed upon as being due in August, 1881, was based upon applications for membership upon which no policies had been issued. But this evidence is expressly contradicted by the evidence introduced by the plaintiff. There is evidence tending to show that there was a dispute and controversy as to the amount the defendant ought to pay. The plaintiff, however, testifies that there was no dispute or controversy as to the number of certificates of membership which were issued and that the policy register of the defendant shows how many certificates were issued. And this is the only question about which any material controversy could have arisen; for there is no evidence tending to show that the defendant was indebted to the plaintiff, or that he was not, for any reason, entitled to receive two dollars for every certificate issued as shown by the policy register. We are therefore of the opinion there was a conflict in the evidence as to there being



a controversy, and that we cannot disturb the verdict. We are strongly impressed that the controversy was more in the nature of an objection ; that the contract was one which operated harshly on the defendant; and that the plaintiff ought not to insist on the payment of the whole amount due under it, which we do not think, under the evidence, was ever seriously disputed by any one, unless it was so disputed under the belief the plaintiff was claiming the contract price for some applications.

**Affirmed.**

## COURT OF APPEALS OF KENTUCKY.

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*Appeal from Hickman Circuit Court.*

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JONES, ETC.,

vs.

LIFE ASSOCIATION OF AMERICA.\* /

A policy of insurance provided that it should be void for failure of insured to pay the stipulated premiums annually.

*Held*, the company having become insolvent, insured was excused from paying subsequent premiums.

EDWARD W. HINES, WHITE & TAYLOR, for Appellants.

J. M. BRAMMEL, for Appellee.

PRYOR, J.

This was an action instituted by the widow and children of Wood M. Jones on an insurance policy issued by the Life Association of America on the life of Jones for \$5,000. The consideration was the annual payment by the insured of \$145 and interest, the premiums to be paid on the 4th of March in every year during the life of the insured. The payments to be made at its office in the city of St. Louis, the policy providing that if failure shall be made in the payment of any sum as stipulated in the policy, then and in such case the policy to be null and void, etc.

A demurrer was filed to the petition and sustained on the ground that the policy had been forfeited by reason of the non-payment of the seventh premium falling due on the 4th of March, 1877. It is

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\* Opinion filed, May 12, 1885. From *Kentucky Law Reporter*.

alleged in the petition that six annual premiums had been paid, and when the seventh premium became due the insured was able, ready, and willing to pay his money, but ascertained (alleging the fact to be true) that the insurance company had failed and ceased to do business, and announced their purpose of making an assignment of its effects. That before the eighth premium became payable, and shortly after the death of the insured, in an action pending against the company in the State of Missouri by the superintendent of the State insurance department, an order was made by which the latter took charge of all the assets of the company. Did the fact that the insurance company became insolvent and ceased to do business excuse the insured from paying the seventh premium? is the only question to be determined in this case.

The demurrer is an admission of the truth of the facts alleged, and therefore we see no reason why the appellees should not have been required to answer.

In the first place it is alleged that the company had ceased to do business, and if so there was no place at which the premium could have been paid, and with the further allegation of insolvency it would have been unreasonable to have compelled the insured to pay his money year after year to an insolvent company that is admitted by the pleadings to have been unable to comply with its contract. If the money had been paid it might have enlarged the assets so as to increase the dividend in a final distribution between those entitled, without resulting in any benefit whatever to the insured. If insolvent the amount of the seventh premium might and probably would have exceeded the amount of the dividend to which the insured would have been entitled under a distribution made by the assignee, and for this reason if no other it would be unjust to require the insured to part with his money in consideration of an undertaking that could never be complied with on the part of the party receiving it.

The obligation to comply with the contract of insurance was mutual, the one as much liable as the other, and the insolvency of the company was a sufficient excuse for withholding the payment by the insured. In the case of the *People vs. Empire Mutual Life Insurance Company*, 92 New York, 105, it is said: "The implied contract of an insurance company with its policy-holders is that it will continue to do its business, keep on hand the funds required by law for the security of its patrons, and remain in a condition so long as its contracts continue to perform its obligations, and when it fails to do this it has broken its engagements."

Here the company or the party representing it is claiming a forfeiture by reason of the non-payment of the premium, and at the same time admitting that if the money had been paid it could not have complied with its contract.

Such a defense will not be permitted in a court of equity, and the court below should have overruled the demurrer requiring the defense to make an issue, and upon a failure to do so a judgment should have been rendered for the plaintiffs. The extent of the recovery is a question not presented by the record.

Judgment reversed and remanded for proceedings consistent with this opinion.

## SUPREME COURT OF PENNSYLVANIA.

STONER

vs.

LINE, ADMINISTRATOR OF MARY SPANGLER.\*

A son-in-law, if not a creditor, nor legally liable for her support, has no insurable interest in the life of his mother-in-law.

PER CURIAM.

The court correctly held that the son-in-law, in whose favor the policy was taken, had no insurable interest in the life of his mother-in-law. He was not a creditor of hers, nor in any manner legally liable for her support or maintenance. Neither could inherit from the other. There was no consanguinity between them. The mere fact that he married her daughter gave him no such pecuniary interest in the preservation of her life, as to permit him to effect a valid insurance thereon for his benefit. As to him it was purely a gambling contract.

Judgment affirmed.

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\* Decision rendered, May, 1885.

## SUPREME COURT VERMONT.

OCTOBER TERM, 1883.

STATE

vs.

ENOS D. HOPKINS.\*

The statute, No. 1, s. 17, acts of 1874 (R. L. s. 3,616), providing, that, if an insurance agent appropriates to his own use any money received by him as such agent, and does not pay over the same, etc., he shall be guilty of larceny, is constitutional.

The respondent and one B. were insurance agents and partners. The indictment made no mention of the firm, but was found against the respondent alone in relation to business done in the name of the firm. *Held*, That a copy of the commission, the original having been lost, appointing the respondent and his partner agents, was admissible to prove the agency charged.

In order to render an entry made by a deceased person admissible, it must be proved, that it was in his handwriting, that it was a part of his duty to make it and in the regular course of business, and that he was dead.

One P. was a sub-agent of the insurance firm or company to which the respondent belonged. A copy of P.'s account, showing the transactions between him and the firm, without proving the loss of the original book, was not admissible for any purpose; and the error can be taken advantage of by merely objecting to its admission, without stating a reason.

An assistant cashier cannot testify to entries made in the bank books prior to his employment, where it did not appear at what time they were made, or who made them, or in whose handwriting, or that he had any personal knowledge of them.

The respondent as an insurance agent was charged with the larceny of money from a foreign insurance company; *Held*, That it was not necessary for the prosecution to prove that the company was legally doing business in this State.

The neglect or refusal to pay over the money within thirty days after notice constitutes a crime. The sheriff, having the respondent in custody, duly

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\* From advance sheets of *Vermont Reporter*.

authorized by an agent of the company, could give the requisite notice ; no particular sum need be named ; nor the authority to give the notice be stated.

There was but one offense, although several premiums were collected.

It was not important to inquire whether the respondent's partner had appropriated any of the insurance money to his own use.

The court charged correctly as to the respondent's commingling the money with his own.

The respondent may be guilty under this statute although he may not have had a fraudulent and felonious intent to steal or embezzle.

It is the duty of the court to charge fully upon all the points of law. All rights can be saved without any requests. Requests may be of great aid to the court, if precise and certain ; but when improperly drawn, they should not be considered.

It was in the discretion of the court to allow the prosecution to examine a witness after the respondent had been directed to put in his defense ; and especially so, as the respondent had no testimony to offer, and notice was given when the State rested that it was expected to use the witness.

The better rule is to prohibit it entirely ; but it is a matter wholly in the discretion of the trial court.

Indictment based upon No. 1, s. 17 of the acts of 1874, charging the respondent as an insurance agent with larceny of money from the Fire Association of Philadelphia, a fire insurance company, having its home office in Philadelphia, Penn. Trial by jury, December Term, 1881, Caledonia County, Ross, J. presiding. Verdict guilty.

As to the 2d question discussed by the court: The State to prove the appointment of the respondent as agent of the Fire Association as alleged in the indictment, offered N. P. Bowman, the respondent's former partner, as a witness, who testified that Bowman & Hopkins were commissioned by the Fire Association, but that the commission was lost and could not be found ; and thereupon the State produced a commission from the Fire Association to P. D. Blodgett & Co., and the witness testified, that that was like the one given Bowman & Hopkins, except that the name Bowman & Hopkins was inserted in the place of P. D. Blodgett & Co., and that the date was about October 1st, 1875.

Whereupon the State offered said commission of P. D. Blodgett & Co., as explained by said Bowman, as a copy of the commission issued to Bowman & Hopkins by the Fire Association, to the admission of which copy the respondent objected, for the reason that said copy showed a commission to Bowman & Hopkins, and not to the respondent Enos D. Hopkins, and therefore did not support the indictment, but was a variance from the agency of the respondent as therein alleged.

As to the 5th question: It became necessary to prove the sum due to Bowman & Hopkins on their deposit in the bank on and after

September 1, 1876; and A. B. Noyes, assistant cashier, was called for that purpose, and allowed to testify, out of the regular order of procedure. When he first came into the court room, he had not examined the bank books, and was sent back to examine them. The counsel for the prosecution at this point gave notice that the State rested with the exception of using said Noyes as a witness. Thereupon the court directed the respondent to proceed with his defense, assuring his counsel that ample time should be given to meet the reserved evidence. Noyes returned with the bank books, and was permitted to testify against the respondent's objection.

As to the notice, or 8th question: It appeared that the only notice to the respondent to pay over the money was given by W. H. Preston, the sheriff, who held the respondent in custody at the time; that after September 1, 1876, one Pope, of Boston, was the general agent for the insurance company in New England; that he appointed all the local agents, and their business was transacted solely with him, but prior to September 1, 1876, with the home office; that the premiums accruing from such business were the property of said Pope, and he was responsible for the same to the insurance company. Said Preston testified that he demanded \$288.81, the sum appearing on the paper handed him by Pope, or by Mr. Ide, the State's attorney, showing the balance due the insurance company; that he thought Pope requested him to make the demand upon Hopkins, as he understood it, for the purpose of laying the foundation for a criminal prosecution; that he was authorized to accept nothing less than the \$288.81; that the respondent was not well at the time, and was in jail, and remained there for several months.

The indictment alleged that the insurance company was legally doing business in this State.

The first count averred that the respondent appropriated the money on the 25th day of March, 1877; the second, on the first day of July, 1876; and the third, on the first day of October, 1876.

It appeared that October 1, 1875, the respondent and one N. P. Bowman formed a copartnership under the firm name of Bowman & Hopkins, for doing insurance business; that in carrying on their said business they represented twenty-one fire insurance companies, and among the number so represented was the Fire Association of Philadelphia; that they continued to do insurance business as a firm until October 1, 1876, but on account of sickness the respondent left the office on the 6th day of September, 1876, and did not afterwards return to take part in the business transactions of the firm.



The respondent's counsel submitted forty-five requests to the court to charge; but, in view of the decision of the supreme court, it is not necessary to state them. The other facts are sufficiently stated in the opinion.

L. H. THOMPSON and ELISHA MAY, for Respondent.

There was error in admitting the copy of the commission. Commonwealth vs. Wellington, 7 Allen, 299; 1 Green. Ev. (12th ed.), s. 65; Commonwealth vs. Wade, 17 Pick., 395; Commonwealth vs. Trimmer, 1 Mass., 476; Bish. Stat. Cr. (1st ed.), s. 910; Commonwealth vs. Pierce, 130 Mass., 31; Moore vs. State, 65 Ind., 215; State vs. Owen, 73 Mo., 441; Williams vs. People, 110 Ill., 385. There was error in admitting the memorandum, "no check," 1 Phil. Ev. (C. & H.'s and Edward's notes), pp. 348, 356; Doe vs. Turford, 23 E. C. L., 390; Champneys vs. Peck, 2 E. C. L., 157; Reg. vs. Worth, 45 E. C. L., 136. In State vs. Phair, the entries were made in the regular course of business. See opinions of Blackburn, Mellor and Lush, JJ., in Smith vs. Blakely, 2 L. R. Q. B., 326; 2 Best Ev., s. 501; Hadley vs. Howe, 46 Vt., 142; Miller vs. Wood, 44 Vt. 378; Davis vs. Lloyd, 1 Car. & Kir., 275; Kent vs. Garvin, 1 Gray, 150; Hibbard vs. Mills, 46 Vt., 243. There was error in admitting the copy of Parker's account: Durkee vs. R. R. Co., 29 Vt., 140; Tucker vs. Bradley, 33 Vt., 328; Bartlett vs. Cabot, 54 Vt., 242; Reg. vs. Langton, 15 Eng. Rep., 369; 1 Green. Ev., s. 436: The State should have proved, as it alleged, that the insurance company was legally doing business in this State: Commonwealth vs. Martin, 130 Mass., 467; Reg. vs. Hunt, 8 C. & P., 642; 2 Russ. Cr. (8th Am. Ed.), 177, 688; 2 Bish. Cr. L. (5th ed.), s. 339; Thorn vs. Ins. Co., 80 Penn. St., 15; Spaulding vs. Preston, 21 Vt., 10; Paul vs. Virginia, 18 Wall, 138. A legal notice was not given to pay over the money. Pope was not authorized, much less to delegate his authority, to give notice: Story Ag., ss. 246, 247; Fisher vs. Cuthell, 5 East, 497; Audley vs. Pollard, Cro. Eliz., 561; Mann vs. Walters, 10 Barn. & Cr., 631; Lyster vs. Goldwin, 42 E. C. L., 611; Stanton vs. Blossom, 14 Mass., 117; Whar. Ag., s. 348; 2 Kent Com. (11th ed.), 633. The respondent should have been informed of Preston's authority. Phillips vs. Bridge, 7 Eng. Rep., 148; 3 Phil. Ev. 592; Bradstreet vs. Clark, 21 Pick, 289; Nichols vs. Boston, 98 Mass. 43; Connor vs. Bradley, 1 How., 217; Rex vs. Jones, 7 C. & P., 833. Notice should have been given both Bowman and Hopkins. Ilsey vs. Essex County, 7 Gray, 465; 2 Kent Com., 633; Martine vs. Ins. Co.,

53 N. Y., 339; *Low vs. Perkins*, 10 Vt., 532. The charge as to commingling the money was erroneous, in that it did not explain to the jury that consent could be implied from the course of business. *State vs. Kent*, 22 Minn., 41; 2 Russ. Cr., 182; *Commonwealth vs. Stearns*, 2 Met., 343; *Commonwealth vs. Libby*, 11 Met., 64; *Rex vs. Hodgson*, 3 C. & P., 622; 1 Bish. Cr. L., ss. 298, 303; 2 ib., ss. 371, 372; *Yates vs. The People*, 32 N. Y., 509. It was error to charge that it was the neglect to pay over the general balance for thirty days after notice. *Commonwealth vs. Shepard*, 1 Allen, 586. Also error to charge that the question of intent was not involved. Crime proceeds only from a criminal mind. 1 Bish. Cr. L., ss. 205, 207, 286, 290, 303; 2 ib., ss. 371, 372; *Reg. vs. Allday*, 8 C. & P., 136; *Smith vs. Kinne*, 19 Vt., 568; *Rex vs. Gill*, 1 Str., 191; *Reg. vs. Reed*, 41 E. C. L., 170; *Robinson vs. State*, 53 Md., 151; Bish. Stat. Cr., ss. 123, 131, 139, 239, 360, 414, 425; *State vs. Gregory*, 10 Reporter, 522; *State vs. Ellis*, 74 Mo., 385; *Jenkins vs. State*, 53 Ga., 33; *Farrel vs. State*, 32 Ohio St., 456; *Faulks vs. The People*, 39 Mich., 200; *Myers vs. State*, 1 Conn., 502; *Commonwealth vs. Power*, 7 Met., 596; *Commonwealth vs. Filburn*, 119 Mass., 297; *State vs. Gilbert*, 16 Reporter, 340. The State charges a felony; it should have proved a felonious intent. 1 Bish. Cr. Proc., ss. 279, 291; 2 ib., ss. 288, 694; *State vs. Wheeler*, 3 Vt., 347; *Commonwealth vs. Adams*, 127 Mass. 17. There was such a variance between the agency and appropriation charged and those proved, that the court should have directed a verdict of acquittal. *Commonwealth vs. Merrifield*, 4 Met., 468; 2 Bish. Cr. L., s. 357; *Fullerton vs. Seymour*, 5 Vt., 249. The court should have compelled the State to choose upon which of the three counts it claimed a conviction. *State vs. Smith*, 22 Vt., 76; 1 Bish. Cr. Proc. s. 211. The respondents should have been allowed to read authorities to the jury. *State vs. Croteau*, 23 Vt., 14; *State vs. McDonnell*, 32 Vt., 491; 10 Met., 285; 7 Gray, 51; 9 C. & P., 362; 65 Ga., 308; ib., 759. The statute is unconstitutional. *Ex Parte Westfield*, 55 Cal., 550.

HARRY BLODGETT, BELDEN & IDE and STAFFORD, *for the State.*

The copy of the commission was properly admitted. *State vs. Brown*, 49 Vt., 440. Also the memorandum, "no check," made by the president of the company. *State vs. Phair*, 48 Vt., 378; 1 Smith Lead. Cas., 139, n.; 1 Phil. Ev. (5th ed.), 348. Also the copy of Parker's account. *Weeks vs. Barron*, 38 Vt., 420. The court has already affirmed the constitutionality of the act in this case. It was

ot necessary to prove a criminal intent. *Shaw, Ch. J., Commonwealth vs. Marsh, 7 Met., 472; Commonwealth vs. Ellwell, 2 Met. 190.*

Clearly analogous to the act under consideration are the Massachusetts statutes prohibiting the sale of intoxicating liquors. Under them it has been uniformly held that the ignorance of the seller as to the intoxicating quality of the liquor he was selling is no defense. *Commonwealth vs. Boynton, 2 Allen, 160; Commonwealth vs. Goodman, 97 Mass., 117; Commonwealth vs. Hallet, 103 Mass., 452.* The question of intent has been held immaterial in cases under the statute against the sale of adulterated milk. *Commonwealth vs. Farrer, 9 Allen, 489; see Commonwealth vs. Emmons, 98 Mass., 6; Commonwealth vs. Hudson, 97 Mass., 565; State vs. Welch, 21 Mich., 22; 3 Green. Ev., s. 21.*

It is wholly in the discretion of the trial court to determine whether the respondent's counsel may read authorities to the jury. *State vs. McDonnell, 32 Vt., 532; Commonwealth vs. Porter, 10 Met., 284; Commonwealth vs. Austin, 7 Gray, 51; State vs. Hoyt, 46 Conn., 330; Curtis vs. State, 36 Ark., 884; People vs. Anderson, 44 Cal., 70; Whar. Cr. L., s. 3,011; State vs. Klinger, 46 Mo., 224; State vs. Smallwood, 78 N. C., 560; Franklin vs. State, 12 Md., 236.* It was in the discretion of the court to allow Noyes to testify when he did. *State vs. Magoon, 50 Vt., 333; State vs. Bridgman, 49 Vt., 202.* If the respondent objected to the means or mode of proving what Noyes testified to, he should have so stated, and the attention of the court called to it, otherwise the objection is waived. *Motley vs. Mead, 43 Vt., 633; Weeks vs. Barron, 38 Vt., 420; Matthews vs. Leconte, 24 Mo., 545; Leet vs. Wilson, 24 Cal., 398.* But we insist that the bank books themselves are the proper evidence of the amount of the deposit, after having been identified as the regular depositor's books. *McKavlin vs. Breslin, 8 Gray, 177; Cavendish vs. Troy, 41 Vt., 99; Mortimor vs. McCullom, 6 M. & W., 58; Hinkle vs. Smith, 21 Ill., 238.* The presumption is, that the company was legally doing business in this State. *Timson vs. Moulton, 3 Cush., 269; Wilson vs. Melvin, 13 Gray, 73; Trott vs. Irish, 1 Allen, 482.* But if the company failed to do its duty, that would be no excuse for the respondent in violating his. *Baldwin Bros. vs. Potter, 46 Vt., 402.*

TAFT, J.

I. It is claimed that the statute under which the respondent stands indicted is unconstitutional. Its constitutionality was

affirmed by this court in a cause entered at the October term, 1878, in Caledonia County, against this same respondent.

II. The respondent and one Bowman, as partners under the name of Bowman & Hopkins, were agents of the Fire Association, an insurance company organized under the laws of Pennsylvania. The indictment makes no mention of the firm, but was found against the respondent alone, in relation to business done in the name of the firm. There was no reason why he could not have been separately indicted. He could in the business of the firm commit the offense charged without any reference to his partner. The fact that Bowman & Hopkins were agents, made the respondent none the less an agent. The commission of Bowman & Hopkins having been lost, it was not error to admit what was shown to have been a copy of it.

III. The State claimed that the premiums on the business of Bowman & Hopkins for certain months in the year 1876 had not been paid. The monthly accounts current for such months were in evidence; and on each of said accounts the memorandum, "No check," had been written, indicating, as was claimed, that no funds accompanied the accounts. This memorandum was admitted in evidence, the respondent excepting. The State claimed that the memorandum was made by the president of the company, Mr. Butler, then deceased. To justify the court in the admission of such evidence it should have been shown that the entry was in the handwriting of Mr. Butler; that he was under an obligation, or that it was a part of his duty, to make the entry, in the regular course of business, and that he was dead. This latter fact was the only one shown; and the admission of the memorandum was error. *State vs. Phair*, 48 Vt., 366.

IV. A. C. Parker acted as sub-agent of Bowman & Hopkins, and to prove when and how the payment of the premiums on the Green policy was made, the court admitted in evidence a copy of Parker's account. His original book was not produced, nor its loss or destruction shown. We think this was error. The copy of the account might have been used by the witness to refresh his memory; but so long as the original book was in existence it was error to admit the copy as substantive testimony. *Tucker vs. Bradley*, 33 Vt., 324. It being a mere copy, it was not admissible for any purpose. We are not inclined to so holding to put the case upon the ground claimed by the respondent's counsel, that, not being

required to state the ground of his objection, he was not bound to specify it to have his exception avail him, as intimated in *Bartlett vs. Cabot*, 54 Vt., 242. In the case at bar the copy was not, substantively, evidence, and could not be, for any purpose, until the loss of the original account was shown; and it could not be made so by the failure of the respondent to object to it as a copy.

V. The testimony of A. B. Noyes was not admissible. He testified as to entries made in the books produced as books of the bank; he was not employed in the bank when the entries were made; it did not appear by whom they were made, when they were made, in whose handwriting they were, or that Noyes had any personal knowledge of them. Such entries, not verified, cannot be testified to by one who has no personal knowledge of them.

VI. Was the prosecution bound to prove that the Fire Association was legally doing business in the State of Vermont? We think the decisions in this State in analagous cases warrant us in holding the negative. In *Baldwin vs. Potter*, 46 Vt., 402, it was held that an agent was bound to account to his principal for money obtained by him as such agent on illegal and void contracts. The same principal was affirmed in *Thayer vs. Partridge*, 47 Vt., 423. No one should be protected by the law in committing larceny of the property of another, in whatsoever manner the property was acquired. Whether the association was legally doing business in this State or not was immaterial. It was not necessary either to allege or prove it.

VII. A question is made upon the notice given the respondent to pay the company the premiums collected and retained by him. The statute makes the refusal or neglect to pay over money to the party entitled to it, criminal only after thirty days from the time of notice to make such payment. It was not necessary to have rendered the notice a valid one that the exact, or indeed any sum should have been demanded, or that the party giving the notice should have had authority to have received the money or that the respondent should have been in good health, or at liberty, or that it was given in order to found a criminal prosecution upon it, or that Preston should have disclosed the particulars of his authority to give the notice. All that the statute required was that the agent should have had notice to pay the money. In this case there was

evidence tending to show notice, and that Preston had authority to give it; and we think the charge of the court on the subject correct.

VIII. Many other questions are made in respect to the charge. We think the court below committed no error in telling the jury that it was not important to inquire whether Bowman had appropriated any premiums to his use; Hopkins was the one on trial, and it was immaterial what Bowman had done. The question was, had the respondent collected premiums and neglected and refused to pay them over after notice? It was an appropriation to the use of the respondent when he applied them to the use of the firm. The fact that the agent was entitled to retain 15 per cent of the premiums gave him no right to the other 85 per cent. We perceive no error in the charge in respect to the commingling the respondent's money with that of the company represented by him, and the consent of the company to the use of the premiums by the firm of Bowman & Hopkins. The jury were told that if the company consented to it, then it amounted to a loan. We think there was but one offense committed by the respondent, not as many as there had been single premiums collected. Although there had been more than one collected, they were all in his hands at the time notice was given; but one notice was given, and the offense was created when he neglected for thirty days to pay the balance due the company.

IX. The remaining question in respect to the charge is the one relating to the intent of the respondent in doing the alleged act. Was it necessary that he should have acted fraudulently and feloniously, that he should have had the intent to steal, that he should have "had a heart void of social duty and been fatally bent on mischief?" We think not. "Nothing in law is more incontestable than that, with respect to statutory offenses, the maxim that crime proceeds only from a criminal mind does not universally apply." *Halstead vs. State*, 12 Vr. (N. J.), 552. Where an act is made indictable, a criminal intent need not be shown, unless from the language or effect of the statute, a purpose to require the existence of such an intent can be seen. Where the law forbids the doing of an act, the intent to do the act is the criminal intent which imparts to it the character of an offense. Convictions of manslaughter are frequent where the only fault in the offenders is that of negligence. For numerous cases where the same doctrine has been held, see *People vs. Roby*, 17 Reporter, 626 (Sup. Ct. Mich.).

We have noticed all the questions in respect to the charge made by the brief for the respondent. We have not examined in detail the multitudinous requests made in his behalf. It is difficult to determine whether they were all complied with or not. All the rights of a respondent can be saved without any requests for instructions. It is the duty of the court to charge fully upon all the points of law in the case; and exceptions can be taken to the charge as given, or the neglect to charge, upon any question. But requests when properly drawn are useful as showing to the court the claims made, the questions which it is desired should be submitted; and at times are of great aid to the court. "When instructions are asked they should be precise and certain to a particular intent, that the point intended to be raised may be distinctly seen by the court, and that error, if one be made, may be distinctly assigned." *United States vs. Bank of the Metropolis*, 15 Pet., 406. "The true object of submitting a point to the court is to obtain a clear and reliable instruction to aid the jury in the formation of an intelligent verdict. The court should decline to receive a point when it is so obscurely worded as to confuse rather than enlighten the jury." *McKinney vs. Snyder*, 78 Penn. St., 497. "A few plain propositions, embracing the law upon the facts of the case, are greatly to be preferred, in every case, to a long string of instructions, running into each other, and involving intricacies, requiring as much elucidation as the facts of the case themselves." *State vs. Mix*, 15 Mo., 153. Forty-five instructions in this case could not have been required on the part of the defendant for the purpose of having his case presented in a proper manner, and enlightening the jury upon the law; and if the requests had been fully complied with, in the order in which they were made, they were calculated rather to mislead and confuse them. Where requests made are of such a character that the court is not bound to receive them, exceptions taken to a refusal to charge as requested, should not be considered; the rights of the respondent can be saved by exceptions taken to the charge as given, pointing out specifically the matter excepted to.

It was not error for the court to permit the witness Noyes to be examined after the respondent had been directed to put in his defense. The respondent had no testimony; and it is difficult to see how the order in which the State's evidence was given affected him injuriously. The order of the trial as to the examination of a witness out of time, is always in the discretion of the court, the adverse party having an opportunity of meeting the evidence thus

given. This point was so held in *State vs. Magoon*, 50 Vt., 333, and *State vs. Potter*, 52 Vt., 33. Under the indictment there was no occasion for the State to elect as to any one offense charged. As we have before said there was, under the evidence as given, but one offense, and that arose when the thirty days elapsed after the notice given him to pay over the balance in his hands. There was no evidence tending to show several distinct and independent felonies, and therefore no occasion to apply the rule contended for.

The question is made as to the respondent having received for the company a substitute for money and not money itself; and it is claimed that evidence of a receipt of checks does not support the allegation in the indictment of a receipt of money. If the respondent received in payment of a premium, a bank check, and collected the check, this would constitute a receipt of money, and would support the indictment in that respect. The jury, we think, were not misled in this matter; they were told to inquire whether the respondent received money; witnesses testified they had paid him money, and the court repeated the question, "Do you find that he did receive the money? that it came into his custody? and did he receive it as such agent?" A jury would have been dull indeed, who could under such a charge have been misled, and have convicted a respondent for receiving a substitute for money, instead of money.

The court "ruled that counsel had not the right in a criminal case to read such authorities as he chose to the jury, nor to read authorities generally." We think this is a correct proposition. It is a matter wholly in the discretion of the court. We see no good object in so doing in any case. The better rule is to prohibit it entirely; it can only tend to confuse the jury in their ideas of the law. It does not follow that because the jury are judges of the law, that counsel can read what they please to them. This rule that the jurors are judges of the law does not affect the course or order of procedure of the trial in the least; it is the result of the power of the jury rather than of any abstract inherent right, and the trial should be conducted in the usual course of proceedings. The reading of law from the books, even by the court, whose duty it is to instruct the jury as to the law, was criticised in *State vs. McDonnell*, 32 Vt., 491, where the court say: "One might almost as well, for any purpose of actual enlightenment, give the jury a general treatise upon criminal law, and tell them the whole law applicable to the case would be found under the title homicide, or manslaughter and murder." My own



impression is, that counsel are not at liberty to insist to the jury that the law is different from that given by the court. As well might they argue to them the questions of the admission or rejection of evidence and many other legal ones arising upon the trial; and this view is not at all inconsistent with the fact, that, by the power of the jury to render a general verdict, they virtually become judges of the law.

The remaining question arises upon the motion to set aside the verdict for the reason that the officer having the jury in custody, was present with them during their deliberations. The oath administered to an officer in charge of the jury in a criminal case contains the provision that he will suffer no person to speak to them or speak to them himself concerning the cause on trial or any matter thereto relating. It does not appear in this cause that any conversation was had by the officer with any one of the jurors; and we do not see how the respondent could have been prejudiced by his mere presence in the performance of his duties in keeping the jurors together. What the effect of his conversing with them in relation to the case on trial would be, we are not called upon to decide.

For the errors indicated, the exceptions are sustained, judgment reversed, verdict set aside, and cause remanded for trial.

SUPREME COURT OF OHIO.

*Error to the District Court of Franklin County.*

FALKENBACH

vs.

PATTERSON, RECEIVER.

SELTZER.

vs.

PATTERSON, RECEIVER.\*

Where a deposit of \$100,000 in securities is made by the company with the superintendent of insurance, as required by §§ 8-16, of O. L., vol. 69, p. 152 (R. S., §§ 3,593-3,595), such securities are held by him as security for policy-holders only, and not for the security of the general creditors of the company.

Such a deposit does not change the character of such securities; and, subject to the rights of such policy-holders, such securities are also subject to the rights of the makers of the same.

When such a company has become insolvent, and is dissolved, and a receiver is winding up the affairs of the company, if a part or all of such deposited securities be needed to pay such policy-holders, there should be collected the amount needed, if the securities are sufficient, to pay such claims; if the securities are not sufficient, the proceeds should be duly applied upon the claims of such policy-holders.

After the claims of policy-holders are satisfied, the remaining securities are liable only to the rights of the company in such securities; and, as against the makers, the company had no rights in accommodation notes and mortgages given to such company for the purpose only of such deposit.

These cases are alike in legal principles.

In March of the year 1877, William M. Patterson, as receiver of the

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Decision rendered, June 16, 1885. To appear in 43 O. S. R.

Ohio Life Insurance Company, commenced his actions in the Court of Common Pleas of Franklin County, one against Joseph Falkenbach and William D. Hill, superintendent of life insurance for the State of Ohio, and others, the object and purposes of which was the foreclosure of a mortgage claimed to have been executed by Joseph Falkenbach to the company, to secure the payment of the note of Falkenbach described in the petition ; and the other against Van S. Seltzer, said superintendent and others, seeking the foreclosure of a mortgage of Seltzer, to secure the payment of his note described in the petition.

The petitions aver the creation and organization of the Ohio Life Insurance Company, as a corporation under the laws of the State of Ohio, to do a business of life insurance about January, 1874, that such company or corporation ceased such business in January, 1875, for the reason of its insolvency and inability to conduct the same. That about May 25, 1876, proceedings were instituted by the directors of such corporation in the Court of Common Pleas of Cuyahoga County to dissolve the corporation and settle up its liabilities, which resulted in the appointment of Patterson, receiver of the assets of said company, with authority to collect the same, and to apply their proceeds to the payment of the liability of the company.

That said corporation, at the time of said dissolution, was not possessed of any assets at its place of business, or elsewhere, except such as are hereinafter stated. That in pursuance of the laws under which said company was organized, and before it did, or was authorized to, commence the business of life insurance, it deposited with the State superintendent of insurance, at Columbus, Ohio, notes secured by mortgages upon real estate amounting upon their face to \$100,000. That the several notes so deposited were each payable five years from date, with interest at the rate of eight per cent per annum, payable annually. That the indebtedness of said company as found by said court, for losses under policies issued before its dissolution and other liabilities, amounted to \$40,000, or more, and that said company has no assets with which to pay any part thereof, except the securities aforesaid; and that among the notes so deposited, were included the note and mortgage of Joseph Falkenbach, and the note and mortgage of Van S. Seltzer. That said notes and mortgages were assigned to W. D. Hill, superintendent of insurance, in trust for the benefit of said company, and its creditors, to be held for that purpose, and were so held by that officer for that purpose, and no other, under the laws of the State in that behalf.

The petitions further aver the amount claimed to be due from Falkenbach and Seltzer. Demurrers to the petitions were overruled.

The defendants below, that is, Joseph Falkenbach in the action against him, and Van S. Seltzer in the action against him, by their amended answers deny substantially the averments of the petitions, except the execution of the notes and mortgages, and deny, that any sum whatever, was due to the plaintiff, as such receiver from Falkenbach and Seltzer, on said notes and mortgages, and aver that such pretended creation and organization of such company or corporation was in fraud of the laws of the State.

The second defense of these answers set forth, that these notes and mortgages were wholly without consideration, as to Falkenbach and Seltzer, and that any pretended consideration upon which the same were signed and executed by them had wholly failed.

The third defense of the answers shows, that Falkenbach and Seltzer were severally induced to make said notes and mortgages by the false and fraudulent representations of one Charles J. Hess, professedly acting for and under the authority of said pretended company.

The replies deny all and singular the allegations of such answers.

The judgments of the court of common pleas in the actions were in favor of Falkenbach and Seltzer, and Patterson, as such receiver, took his appeal to the district court.

The district court in each of the cases, found generally for the plaintiff, and upon request of the plaintiffs in error found the facts and conclusions of law, separately, as follows:—

1. That the defendants, Joseph Falkenbach and Van S. Seltzer made and delivered to the Ohio Life Insurance Company the notes and mortgages described in the petition.

2. That they were, by the president and secretary of said insurance company, indorsed and delivered to the the superintendent of insurance as stated in the petition.

3. That they were, by said superintendent, deposited with the State treasurer on or before January 20, 1874, and have since remained so deposited.

6. That the several acts and proceedings required by law to be done and performed by the corporators prior to commencing business, were by said corporators so done and performed, and that said corporation was regularly organized in due form of law, and de-

posited with the superintendent of insurance, the securities required by law, before said superintendent issued to said corporation his certificate of organization and authority to commence business.

7. That the amount evidenced by the notes and mortgages deposited with and transferred to the State superintendent as certified to him was \$100,000, which amount included the notes and mortgages of said defendants, Joseph Falkenbach and Van S. Seltzer.

8. That Charles J. Hess was in some way an officer or agent of the corporators or company, and was engaged in procuring subscribers to the stock, and notes and mortgages to be deposited with the superintendent to complete the organization for business.

9. That said company became insolvent; that its officers, on June 1, 1876, applied to the Court of Common Pleas of Cuyahoga County, under the act April 15, 1867, for a dissolution of said company and the appointment of a receiver to settle up its affairs pursuant to said act of April 15, 1867; that the superintendent of insurance was a party to said proceedings.

10. That in and by said court, and in said proceedings, the plaintiff was appointed receiver, said superintendent not objecting thereto, with full authority, so far as the court could confer the same, to collect the assets and pay the liabilities of the company, among which assets was included the note and mortgage of defendant.

11. That the plaintiff gave bond and was qualified to act as such receiver, and has so remained ever since.

12. That a large number of policies were issued by said company while it did business, and were outstanding at the time of said dissolution.

13. That the liabilities of said company to policy-holders and general creditors amount to \$35,000 or more, and that the proceeds of the notes in suit are necessary to pay the same and make good losses to policy-holders.

14. That said defendant, Joseph Falkenbach, was not a subscriber to the capital stock of said company, but that said Falkenbach received \$1,900 in the stock of said company, being certificate No. 26, for nineteen shares.

15. That the said defendants made and delivered their notes and mortgages under the following circumstances: That said Charles J. Hess, who was a personal acquaintance, applied to them for the same; that he stated to them that he required the amount of said notes to make good the \$100,000 required by law to be deposited with superintendent of insurance before the company could do any business, and that when the company got into business he would in a short time procure other securities to be deposited in their place, and would then return to them the notes and mortgages so requested; that in pursuance of this request, and to accommodate said Hess, they gave the notes and mortgages in suit without any consideration with knowledge that they were to be transferred to the superintendent of insurance, under the law, and to obtain for the company the proper certificates to enable it to do business.

Upon the facts aforesaid, the court state the following conclusions of law, to wit:—

1. That the indorsement of approval by the attorney-general, on the charter or certificate was sufficient, but if technically insufficient, the defendants, as against the policy-holders, represented by the receiver, could not question the organization.

2. That the receiver was and is the proper person to bring and maintain the action, but if there were doubt about it, he and the superintendent, both being parties, a proper decree could be rendered without dismissing the action.

5. That the stubs from the stock books, and the letters offered by plaintiff to show that the defendant was a stockholder, are not competent evidence for that purpose, and that the receipt of February 10, 1874, signed by Joseph Falkenbach, is competent to show that he received stock in said company.

6. That defendants, having given their notes and mortgages to accommodate Hess and enable the company to obtain the certificate, that \$100,000 had been deposited and such use having been made of them with their assent, they are estopped as between them and the receiver, representing the policy-holders, from setting up or maintaining the defenses of fraud and want of consideration. Decree is therefore ordered for the plaintiff.

To the decrees Falkenbach and Seltzer severally excepted and took bills of exceptions, and they now ask for a reversal of the judgments of the district court.

LORENZO ENGLISH and GEO. K. NASH, *for Plaintiffs in Error.*  
ESTEP, DICKEY & SQUIRE, *for Defendant in Error.*

FOLLETT, J.

Section 5,658, revised statutes, provides that, "such receiver shall be vested with all the estate, real or personal, of the corporation, from the time of his having filed the security hereinbefore required, and shall be trustee of such estate for the benefit of the creditors of the corporation and its stockholders; and he shall have all the power and authority conferred by law upon trustees to whom assignments are made for the benefit of creditors."

William M. Patterson, as receiver of the Ohio Life Insurance Company, is in the place of the company, and has only the same rights that the company would have: *Bell, Receiver, vs. Shibley*, 33 Barb., (N. Y.). 610; *Coope vs. Bowles*, 42 Barb., 87; *High Rec.*, § 201; and the liabilities of third parties are not increased or varied by his appointment as receiver: *Lincoln vs. Fitch*, 42 Me., 456.

There pass to the receiver the property and rights of the corporation, precisely in the same condition and subject to the same equities as they were held by the corporation: *Receivers vs. Patterson Gas Light Co.*, 3 Zab., 283; *High Rec.*, § 205.

There is but little, if any, dispute as to the facts of this case.

As shown on the face of the papers, \$100,000 of notes, and mortgages appearing to secure the same, were deposited with the superintendent of insurance; and among the notes and mortgages were those of Falkenbach and Seltzer, who gave to the company their notes and mortgages without consideration, and to accommodate the company and Hess, who was the main agent of the Ohio Life Insurance Company.

These makers gave these accommodation notes and mortgages, to be deposited with the superintendent of insurance, under the following statutes: *Ohio Laws*, Vol. 69, page 152, "Sec. 8. Any life insurance company organized under this chapter, or any other law of this State, may invest its capital in stocks, bonds and mortgages, or securities mentioned in the preceding section, and change and invest the same or any part thereof in like manner, at pleasure; but no company shall commence business until it has deposited with the superintendent of insurance, at least one hundred thousand dollars of the stocks, bonds and mortgages aforesaid, or one or more of them, duly made or assigned to said superintendent in trust for the purposes mentioned in this act."

Sec. The superintendent of insurance shall hold such securities

as security for policy-holders in said companies, but as long as any company so depositing shall continue solvent he shall permit such company to collect the interest or dividends on its securities so deposited, and from time to time to withdraw such securities, or any part thereof, on depositing with said superintendent other securities of the kinds heretofore named and of equal value, with those withdrawn."

"Sec. 10. Whenever the corporators shall have fully organized such company, and shall have deposited with the superintendent the requisite amount of capital, said superintendent shall furnish the company with a certificate of such deposits, which, with a certified copy of the papers required by this chapter, when filed in the county recorder's office of the county wherein such company is located, shall be the authority to commence business and issue policies, and the same may be used in evidence for and against the company in all suits."

And when the notes and mortgage were so used as a part of such deposit, they must remain "as security for policy-holders in said company." The statute is clear and imperative.

And we think it is clear that, as to such policy-holders, Falkenbach and Seltzer are estopped to deny the existence of the corporation and its power to issue such policies. But what, if anything, is due in this case to policy-holders? There is no finding or evidence in the record from which we can ascertain any specific sum. The court finds, "that the liabilities of said company to policy-holders and general creditors amount to \$35,000, or more;" and in the record of the original case the plaintiffs, on May 25, 1876, "express the hope and belief that in a short time every policy outstanding against the company, and which shall not have elapsed by reason of the non-payment of assessments and premiums, will be canceled and taken up." It may be that no policy-holder has a claim secured by these deposits.

Before those mortgages can be foreclosed there must be shown some specific amount due, or that may become due, on account of such policy-holders, and that such amount is a claim against this special deposit. And when such amount is ascertained, the amount needed from the deposit to pay the same, should be obtained through the superintendent of insurance, who is the holder in trust of the deposited securities.

The superintendent of insurance should act and perform his trust; and as he was formally made a party to the suit, he may disclose the



facts of such trust; and when the trust is fully performed, the remainder of the deposit, if any, should be properly disposed of.

The receiver has no rights in that part of the deposit of \$100,000 that the company did not own; but he has a right to know what the company did own, and he has an interest in the rights of the company in the deposit, though the rights of the company are subject to the rights of the policy-holders.

It is suggested that such a claim must first exhaust the stockholders' liability before these deposits can be required to be used.

We think that such is not the law in this State.

In *Wright vs. McCormick*, 17 Ohio St., 86, this court held that the liability imposed upon stockholders is a security "over which the corporate authorities have no control," and that "this statutory liability of the stockholders, is not a primary resource or fund for the payment of the debts of the corporation."

But the general creditors are not in the same relation to these deposited securities. They have an interest only in the rights of the corporation. The notes and mortgages of Falkenbach and Seltzer were not the property of the corporation. They were accommodation notes and mortgages, made without consideration, and taken and used by the corporation for a specific purpose. As against the makers, the corporation had no right to them for any other purpose. The corporation could not sue and compel the makers of these notes to pay to the corporation the amount of the notes, neither could the corporation foreclose the mortgages.

The receiver, as acting for the general creditors, has no more rights in them than the corporation had; and the makers of these notes and mortgages may defend against the claims of the general creditors, who have no rights in them; and these makers are not shown to have done any act that estops them to set up their defense in a suit by the receiver, as the representative of the general creditors.

As to the other questions in the case we express no opinion.

Whether or not Falkenbach and Seltzer are estopped to deny they are stockholders in the company, we express no opinion; and this reversal is without prejudice to either party as to that matter.

On the facts, the court erred in the judgment and in ordering the mortgages to be foreclosed, and the judgment is reversed and the case remanded to the circuit court for further proceedings.

**Judgment reversed and case remanded.**

UNITED STATES CIRCUIT COURT,  
SOUTHERN DISTRICT OF NEW YORK.

FULLER AND OTHERS

vs.

KNAPP AND OTHERS.

Where a demurrer to the whole bill has been overruled and leave given to answer, the defendant cannot a second time avail himself of the demurrer. The bill alleged the issue of a policy on the "reserve dividend plan" and also certain instructions to the agent explaining the plan upon the faith of which representations the policy was accepted. The issue of such instructions was denied by the company.

*Held*, That the company was not bound to answer interrogation regarding the meaning of the term "reserve dividend."

Jurisdiction as to how far a company must account for the management of a reserve dividend fund is exercised largely as a matter of discretion.

A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts as alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

Parties to a contract of life insurance do not contemplate that the policy-holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policy-holder shall have the benefit of such dividends as are appropriated, not such as the policy-holder or the court may think might have been discreetly appropriated by the company.

WALLACE, J.

The complainants' motion is, in substance, one to remove a demurrer from the files. The defendants demurred to the bill for

want of equity, and the demurrer was set down for argument, and was overruled. The defendants then answered, and at the same time demurred again to the whole bill. A defendant cannot at the same time answer and demur to the whole bill, though he may demur to part and answer to the residue. Equity rule 32. After a demurrer has been overruled, a defendant may insist upon the same matters by way of defense in his answer. This has not been attempted here. The defendants cannot be permitted, after a demurrer has been overruled which goes to the whole bill, and leave has been given them to answer, to avail themselves a second time of the demurrer. The motion is therefore granted. The complainants also move to compel the defendants to answer certain interrogatories annexed to the bill. This is not correct practice. If the answer is deemed to be insufficient, the complainant must present exceptions stating the charges in the bill, the interrogatories applicable thereto, to which the answer is responsive, and the terms of the answer verbatim so that the court may see whether it is sufficient or not. *Brooks vs. Byam*, 1 Story, 296.

As the question of the sufficiency of the answer has been fully discussed by counsel, and elaborate briefs have been submitted asking for a consideration of the merits, it is deemed proper to indicate what disposition should be made of the exceptions when they are formally presented. The bill is for discovery and relief. It seeks an accounting concerning a fund in which the complainants have an interest, and a discovery of facts upon which the amount of the fund and the complainants' interest depends. It is founded upon a policy of insurance issued by the Metropolitan Life Insurance Company, one of the defendants, March 2, 1874, upon the life of Austin B. Fuller to Harriet A. Fuller, his wife. The other defendant, Knapp, is the president of that company. The bill alleges that the company, by the terms of the policy, in consideration of certain payments made and to be made by Harriet A. Fuller, agreed that, should Austin B. Fuller die within ten years from March 2, 1874, it would pay to Harriet A. Fuller the sum of \$10,000; and that, should he survive the said ten years, the company would pay the said Harriet A. Fuller the sum of \$1,231 as a reserve endowment; and also agreed that said policy was issued on the "reserve dividend plan," and that should the premiums be paid as stipulated for ten years from the date thereof, and should said Austin B. Fuller survive that period, it would pay the said Harriet A. Fuller her equitable proportion of "the reserve dividend fund" in cash.

Further averments are intended to show what is meant by the terms "reserve dividend plan" and "reserve dividend fund" as used in the policy. These averments are to the effect that the company issued certain printed instructions to its agents, and especially to the agent through whom the complainants obtained the policy in suit, containing an explanation of the scheme of insurance, and an exposition of the rights of the assured, and the obligations of the company under a policy issued on the reserve dividend plan. It is alleged that in these instructions the company represented that all persons who take policies within the same year form a class, which is treated by the company as a distinct body for ten years; that the company guarantees to the policy-holders an equitable share in all the surplus earnings of the company which are to be divided at the end of each year. But the policy-holders stipulate among themselves that all these dividends shall be retained by the company at the average rate of interest obtained on all its investments, and be divided at the end of the ten years between the policy-holders of the class then living; that if any policy is forfeited for non-payment of premiums, the dividends which have already accrued upon it inure to the benefit of the other policy-holders of the class, and are to be retained by the company, invested, and divided at the end of the ten years among the living members of the class; and that death-claims are paid out of the general funds of the company, and not out of the class fund exclusively. It alleges that the company also represented in these instructions that the reserve fund under the reserve dividend plan is accumulated from several sources: from ordinary dividends arising from the general earnings of the company; from the dividends which lapsed to the class by the death of members before the expiration of ten years; and from the dividends forfeited to the class by non-payment of policies, and by retiring members.

The bill alleges that the complainants accepted their policy upon the faith of these representations as to the character and incidents of "the reserve dividend plan," and that these representations are in fact a correct statement of the plan as the term is used in the policy. It further alleges that many other persons became insured in the same class with complainants, upon the reserve dividend plan; some of whom died within the ten years, whereby the accumulated dividends upon their policies accrued to the general fund; some of whom retired, and thereby forfeited their dividend; and that the policies of others lapsed. That interest was earned by the company upon its investments, and defendants are now in possession of the

whole fund accruing to the class. That the defendants have in their possession books and records showing all these facts, details of which are not known to complainants, and without a discovery of which complainants cannot prove the facts upon which their rights to relief depend.

The bill contains appropriate allegations to show that complainants duly paid the premium upon the policy during the ten years, and that Austin B. Fuller survived the ten years of its duration, and the complainants became entitled to the equitable proportion of the reserve dividend fund in cash, due to the policy-holders of the class of 1874. Interrogatories are propounded to the defendant calling for a statement of the earnings of the company during the ten years, and incidentally of the receipts, expenses, and losses; a statement of the average interest received by the company on its investments during the ten years; a statement of the names of policy-holders in the class of 1874; and how long each policy continued in force, what premiums were paid upon it, what dividends were earned when it lapsed or matured, what interest was earned by the fund, and what payments had been made from it. The defendants are also interrogated whether the company issued to their agents, or to the agent through whom the complainants insured, the instructions explaining the reserve dividend plan as set forth in the bill; and whether the term "reserve dividend plan" as used in the policy is the plan described in the instructions; and if not as so described, defendants are required to state what is the correct meaning of the term.

The answers of the defendants admit the issuing of the policy described in the bill; set out the policy in full; deny that the company issued such instructions to its agents as are stated in the bill; deny that such instructions correctly describe the meaning of the term "reserve dividend plan" as used in the policy; allege that the policy alone comprises the whole contract between the parties; admit that many other persons became insured in same class with defendants, under the reserve dividend plan; admit that dividends were earned on some of the policies, and that some of the persons so insured died, some retired, and some forfeited their dividends; admit that interest was earned by the company upon its investments; and allege that the company has set apart and apportioned the fund among the different policies entitled to the same, and now holds the equitable proportion of the fund earned by the complainants' policy, and is ready and willing to pay over the same. They refuse to answer the interrogatories requiring them to state what is

meant by the term "reserve dividend plan," or what its meaning is as used in the policy; and refuse to answer any of the interrogatories which call for statements of facts, by which the amount of the reserve dividend fund for the class of 1874, and complainants' proportion thereof, can be ascertained.

The material parts of the policy, as set forth by the defendants, are the same as is alleged by the bill, except that it contains the following clauses:—

"At the request of the assured this policy is issued upon the reserve dividend plan. \* \* \* This policy shall not be entitled to any share in the dividend surplus of said company other than at such time and after the manner and upon the conditions hereinbefore described."

There is nothing in the policy to explain the features of the reserve dividend plan, what obligations the company assumes to the policy-holder, or what interest accrues to the policy-holder whose policy is issued under such plan.

A defendant is at liberty to decline to answer any interrogatory, from answering which he might have protected himself by a demurrer, notwithstanding he answers other parts of the bill (equity rule 44); and, although he submits to answer, he is not compellable to answer other matters than he would be compellable to discover upon filing a plea in bar, and an answer in support of such plea. Equity rule 39.

The sufficiency and the equity of the bill have been considered upon a former occasion, when the demurrer was overruled. It was then held that if the contract between the parties was such as is asserted by the bill, the beneficiary in the policy, at the end of the ten-year period, was entitled to recover a sum, the amount of which, if disputed, would involve the taking of a complicated account, in which the discovery sought by the bill would be essential to enable complainants to proceed. From the nature of the transactions involved, it is apparent that practically all the information which is indispensable to enable complainants to ascertain what sum they are entitled to is exclusively within the knowledge of the officers of the company. Upon the case made, they are entitled to portion of the fund, the amount of which necessarily involves an inquiry as to the number and amount of the policies of the class of 1874, the dividends which accrued upon them, the number that have been forfeited or have lapsed by retirement or death, the times when they lapsed or became forfeited, and of the interest due upon the invest-

ment of the dividends. In the management of this fund the company acts as the agent, in a limited sense, of the policy-holders, and owes them the duty of keeping a correct account of the fund. It refuses to render that account, and seemingly takes the position that the policy-holders have no right to an account. Jurisdiction in this class of cases, depending as it does, not so much on the absence of the common-law remedy as upon its inadequacy, is exercised largely as a matter of judicial discretion, influenced by the particular circumstances of each case and the conduct of the parties: *North-eastern Ry. Co. vs. Martin*, 2 Phil., 758; *Southeastern Ry. Co. vs. Brogden*, 3 Macn. & G., 23; *Foley vs. Hill*, 2 H. L. Cas., 28; *Anderson vs. Noble*, 1 Drew., 143; *Bliss vs. Smith*, 34 Beav., 508; *Pike vs. Dickinson*, L. R. 7 Ch. App. Cas., 61.

Whether, if discovery were not sought, the bill would be maintainable, it is not necessary to decide; it is sufficient that, being one for discovery as well as for relief, it falls within the class recognized by the authorities as cognizable in equity: *Mackenzie vs. Johnson*, 4 Madd., 373; *Phillips vs. Phillips*, 9 Hare, 471; *Shepherd vs. Brown*, 9 Jur. (N. S.), 195; *Hemings vs. Pugh*, id., 1,124; *Makepiece vs. Rogers*, 11 Jur. (N. S.), 314; *Dinwiddie vs. Bailey*, 6 Ves., 136; *Moses vs. Lewis*, 12 Price, 502; *Story, Eq.*, § 458; *Miller vs. Kent*, 16 Fed. Rep., 13.

When the bill was before the court upon demurrer, it was not necessary to determine with precision how far the complainants were entitled to a discovery respecting the matters of the bill, although it was then incidentally intimated that some of the interrogatories were beyond the scope of the allegations. A complainant cannot interrogate as to matters which he has not put in issue, although he may expand his interrogatories so as to cover every incident of the facts alleged. If interrogatories are propounded as to facts beyond the scope of the inquiry to which the bill is legitimately addressed, the defendant may omit to answer, and have their propriety tested upon exceptions to his answer, as he might by a demurrer to such interrogatories.

There are no allegations in the bill which authorize the complainants to interrogate the defendants respecting the general earnings, expenses, and losses of the company during the ten years in question. There is nothing in the policy itself, or in the conditions of the reserve dividend plan, as the features of that plan are described in the bill, which authorizes a policy-holder to require the company to appropriate or apportion annually among its policy-holders its sur-

plus net earnings; much less to apportion such a sum as might have been realized as net income, if the company had conducted its business prudently and efficiently. A dividend is a sum actually apportioned. The parties to a contract of life insurance do not contemplate that the policy-holder is to be permitted to participate in the management of the company, or dictate the amount of the dividend it shall declare, or question the result after the discretion of its managers has been exercised in this behalf. The contract is that the policy-holder shall have the benefit of such dividends as are appropriated, not such as the policy-holder or a court may think might have been discreetly appropriated by the company. It follows that the defendant should not be required to answer interrogatories Nos. 8, 11, 13, 14, 15, 16, 17. The seventh interrogatory would seem to call for all information necessary in support of the facts alleged in the bill, so far as they relate to the amount of the reserve dividend fund. Interrogatories Nos. 9, 10, and 12 are repetitions in part of No. 7, with modifications which are not material in any aspect that the accounting may present.

The other interrogatory which is not answered, calls upon the defendant to describe the term "reserve dividend plan," and to state what its meaning is as used in the policy. Inasmuch as the defendants deny that the plan is such as the complainants allege it to be, and there is nothing in the policy itself to indicate what are its features or details, and the covenants of the policy cannot be interpreted without the aid of the explanation, the defendants are properly called upon to explain the meaning of the term. Greenl. Ev., §§ 280, 293. The parties treat in reference to the conditions and features of that plan. In one view it may be regarded as an intrinsic agreement, incorporated by reference into the policy. In another, the term may be considered as having a signification, by usage, known to experts, and which is to be ascertained from competent witnesses. It is not known to have a legal, defined meaning. What that term means as used in the policy is a conclusion of law, and so far as the interrogatory calls for a legal conclusion, it does not require an answer.

The defendants cannot be excused from answering the interrogatories upon the ground that their answer sets up matters by way of defense which are a bar to the suit. It is said by Mr. Tyler (Mit. & T. Eq., Pl 74) that "the modern practice of making of defenses by answer has led to great confusion; and questions in pleading have arisen so paradoxical that judges, perplexed and bewildered, have hardly known how to decide them." No perplexity exists, however,



in this case. The answers, taking their affirmative and negative statements together, do not meet the material allegations of the bill, so far as they relate to the rights of the complainants to call upon the company for an accounting. The material facts are admitted upon which their right rests, and it is not denied that the company now has in its possession a sum of money to which they are entitled.

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SUPREME COURT OF MICHIGAN.

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*Appeal from Sanilac.*

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MACLEM

vs.

BACON.\*

The statute provided that the members of mutual companies should be liable for such assessments by a receiver as were necessary to pay all losses and expenses, but all the parties insured in a mutual company had agreed that their liability should be limited to the amount of their premium notes.

*Held*, That where the agreement had been entered into through a mistake of law equity, would relieve against farther liability.

BEACH & MACLEM and C. J. WALKER, for Complainant and Appellant.

JOHN ATKINSON and ISAAC MARSTON, for Defendant.

CHAMPLIN, J.

The Mutual Fire Insurance Company of Sanilac, Huron, and Tuscola counties, was organized under the laws of Michigan : 1 How.

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\* Opinion filed, June 17, 1886.

St., c. 132. Section 5 of that act required the corporators to declare in the charter adopted by them the mode and manner in which the corporate powers conferred by that chapter were to be exercised, and they were authorized by that section to prescribe in their charter the liabilities of the members to be assessed towards defraying the losses and expenses of the company, and the mode and manner of collecting such assessments. In case the corporation becomes insolvent, or fails to pay its losses as required by the act, it is made the duty of the commissioner of insurance to proceed in the circuit court of the proper county, and obtain the appointment of a receiver for the company; and section 17 makes it the duty of the receiver to "at once proceed to assess upon all of the members and persons insured in such company such sums of money as will in the aggregate be sufficient to pay all the losses and liabilities of such company, together with the services and expenses of such receiver, according and in proportion to the amount of their insurance or interest in such company;" and if the amount realized by such receiver be insufficient to pay the losses and liabilities therein, and expenses, he may make a second and other assessments, as may be necessary. It was held in *Russell vs. Berry*, 51 Mich., 287, s. c., 16 N. W. Rep., 651, that the authority to prescribe the liabilities of the members to be assessed related to the ordinary exercise of their corporate powers by the company, while it was in a solvent condition, and carrying on its business in the ordinary way; but that the statute prescribed its own rule for assessments after the corporation had passed into the hands of a receiver, and that this rule could not be changed or limited by the charter or by-laws of the corporation.

On the sixteenth of July, 1877, complainant applied to the company to become insured by it to the amount of \$1,700 for three years. The insurance was effected through a written application made upon the company's blanks, and for which insurance he gave to the company his premium note, a copy of which is as follows: "For value received, I agree to pay the Mutual Insurance Company, in such sums and at such times as they may require to pay losses and expenses, not to exceed the sum of twenty five and fifty one-hundredth dollars, payable at the company's office. **ANDREW MACLEM, Applicant.**" At the same time he paid the company seven dollars and ten cents down upon the note. A policy was issued to complainant, which was renewed on the sixth day of July, 1880, for three years longer. Soon after this came the extensive fire which devastated Huron County, consuming many of the risks taken by

the company, and the result was it was unable to pay the losses incurred by assessments on its premium notes. At the instance of the insurance commissioner, defendant was appointed receiver under the law, and an assessment made under section 17 of the act. The amount assessed against complainant on his \$1,700 was \$144.50, and a suit at law has been brought therefor. The complainant then filed his bill to enjoin that suit upon the ground that the contract of insurance and the liability growing out of it were entered into under a serious mistake both of law and of fact, and such mistake as entitled complainant to a perpetual injunction against the receiver, restraining him from making any assessments or taking any proceedings to recover any assessment in excess of the premium note, and from prosecuting the suit commenced.

The bill avers that Benjamin H. Mudge was the general agent of the insurance company, and also soliciting agent, and was expressly authorized to make the representation which he did make to the complainant. No fraud is averred or claimed. These statements I quote at length from the bill:—

“Your orator further says that it was explicitly represented to him before and at the time of making such application, as part of the inducement to take such insurance, by Benjamin H. Mudge, the general soliciting agent of said company, upon questions directly put to said agent by your orator for that purpose, that the extent of your orator’s liability in any case could not exceed the amount of said premium note, and, as the general agent then and there remarked, that if all the buildings insured in said company except your orator’s be destroyed by fire, still your orator would be liable only to the amount of his said premium note; which statement your orator has good reason to believe said general agent, Benjamin H. Mudge, will not deny.

“Your orator has good reason to believe, and does so believe and so states the fact, that the persons insured in said company, including those that suffered losses, expected that they were liable only to the amount of their premium notes, and in no case could it exceed the amount of said premium notes, and so believed they were liable only to said amount until the assessment made by said receiver.

“Your orator further says that the conversation had with the said general agent at the time of taking said insurance led him to believe that if your orator should be among those that suffered losses which should exceed the amount of all the premium notes, then your orator would receive only such proportion of his loss as said premium

notes would bear to such loss, and such was the belief of those persons that were insured in said company who suffered losses.

“That your orator expressly stated to the said general agent, before and at the time of making such application, that if there was any probability of liability beyond the said premium note he wanted nothing to do with it, and such insurance was negotiated and taken by said general agent with the express understanding that your orator’s liability could not in any case exceed the amount of his premium note ; that the general agent then and there stated to your orator that such was the law under which said company was organized, and such was the charter and by-laws of said company; that your orator was induced by such assurances and expressions made by said general agent to make application for such insurance ; and the wording of the premium note so signed by your orator led him to believe that such representations were true and correct; that after receiving said policy and reading the by-laws carefully over, especially by-law No. 14, and after examining the charter, which is printed on another policy of insurance in said company, which is held by your orator, further led him to believe that such representations were true and correct.

“And your orator further shows that each and every person insured in said company so understood his rights and liabilities by reason of the representations of the managers and general agent of said company, and there was nothing in the statute laws under which said company was organized that was contrary to the by-laws and charter of said company; and the attorney-general and the commissioner of insurance of this State certified that the charter of said company was in accordance with the statute under which said company was organized, and they, as well as your orator, believed that said charter conformed to the law of this State, and there was nothing in said charter, as your orator could perceive, would make him liable beyond the premium note so signed by him. Nor was there any law on mutual insurance companies, as expounded by the courts of this State up to or about the time of making such assessment, that gave your orator any knowledge of further or greater liability or indemnity than shown by the premium note.

“And your orator further says that he is, always was, and still is, willing to pay the full amount of said premium note, but that he refuses to pay anything in excess thereof, for the reason that it was contrary to the contract and agreement made and entered into with

said general agent, and contrary to the representations made by said agent, and for other reasons heretofore mentioned.

"And your orator avers that nothing has occurred since the issuing of said policy of insurance, and the making of such representations by said general agent, to undeceive your orator as to his rights and liabilities, until the threatened action and demand of the said receiver for the amount of your orator's assessment, as made by him.

"And your orator avers that had he, at the time of making such application, understood, or had he the remotest idea that his liability might, under any circumstances, exceed the amount of his said premium note, he would not have entered into such contract for insurance, but that he did so enter into such contract relying upon the representations of said general agent as to the liability of the insured in said company.

"And your orator shows that so understanding, and having no knowledge of any further liability until such assessment, his delay to procure relief from such a contract by having the same set aside should not shut him out from relief in this court at this time.

"And your orator further shows that said Benjamin H. Mudge, at the time of making the representations and the original contract of insurance, and at the time of making the renewal thereof, was the general soliciting agent of the company, elected and appointed by the board of directors thereof, and by them authorized to make such representations as to the liability of the insured in said company; that when said application of insurance was taken it was the intention of said general agent and officers of said company to bind your orator only to the amount named in said premium note. Said general agent and officers never expected that your orator was liable beyond the premium note signed by him, and all the insured expected and intended that the premium note was the limit of their liability. Both your orator and officers of said company, from the time said company was organized to the time said company became insolvent, supposed that the contract entered into, whereby your orator should be liable only to the amount of the premium note, was in accordance with the statute under which said company was organized, and so expected that the premium note signed by your orator was the extent of his liability until the threatened action of said receiver.

"Your orator further says that said general agent, before and at the time said application was taken, stated to him that all the mem-

bers (which number nearly one thousand) were first-class, reliable, and responsible persons, and if necessary could be compelled to pay the full amount of their premium notes; that your orator was unable in any way to find out the financial condition of the members of said company, but had to rely upon the statement made by said agent, as it was impossible to find out the liability otherwise. Your orator states the fact to be that a large portion of said members, at the time your orator insured, were uncollectible, having little or no property, and still a larger portion of said members only held that amount of property which is exempt by law from execution.

"Your orator further shows that, should the amount of assessment be collected as made by said receiver, your orator, with a certain few, would be compelled to pay the amount, and thereby be financially ruined, for the reason that a large portion of said members have very little or no property, and still a larger portion have only that amount of property which is by law exempt from execution.

"And your orator further shows that said receiver, unless restrained by the order of this court, will proceed to judgment in the said case at law, to the great damage and loss of your orator."

The bill is supported by the affidavits of Michael Hanselman, who was its president, and of William A. Mills, who was one of the original corporators of the company, and was its secretary from 1876 to 1882, each of whom swear that it was their understanding that persons who were insured in the company were liable to pay nothing beyond the amount of their premium notes by way of assessment; and they also swear that they believe that all the officers and directors of the company held to the same opinion; and Mr. Mills says that it was known to the officers and directors of the company that Benjamin H. Mudge, the general soliciting agent, made such statements and representations, and were never questioned by the officers and directors; that he "has good reason to believe, and does believe, that all persons who were insured in said company so understood and believed." It will thus be seen that each member of the company has equal claims to relief with the complainant, and there is no source from which losses can be met by the receiver other than the premium notes, if any are uncollected.

The questions raised are of the first importance both to the complainant as affecting his liability, and to his associates who have suffered loss, and who look to the liability of the members of the company for indemnity. His right to relief is based exclusively (1)

upon his mistake of law, and (2) his mistake of fact. These will not be considered separately. The averment in the bill that the mistake of law was mutual, lends no aid to the equities arising from such mistake, for in any case there must be something that makes it inequitable for the opposite party to the contract to insist upon its enforcement, or equity will not interfere. It is well settled that it is not every mistake of law, although accompanied with injurious results, that will lay the foundation for equitable interference, and an examination of the authorities where relief has been granted or refused, will disclose that each case is based upon its own peculiar circumstances, and they are so unlike that no general rule can be extracted therefrom. A mistake of law is something, however, that operates upon the mind and induces action in reliance upon what the party acting believes, or supposes to be, his legal rights. It is an act done or suffered under a misapprehension of legal rights, and is necessarily based upon his ignorance of what his legal rights are. In order to invoke the equitable powers of a court to be relieved against his misapprehension induced by ignorance, he must be free from negligence as a cause of his mistake, and also in discovering the existence thereof. Diligence in discovering and enforcing a right lost or impaired by a mistake is as essential as diligence in the discovery of fraud, and promptness in seeking relief therefrom.

Now it is claimed by the complainant that he entered into the contract between himself and the insurance company in ignorance of the provisions of the seventeenth section of the general insurance law. He claims that the contract that he believed he was entering into was to this extent and no more, namely: That in consideration of indemnity to the amount named in his policy, against loss of his own property, he agreed to pay, for the indemnity against loss of other parties insuring in the same company, a sum not to exceed \$25.50, to be assessed according to the charter and by-laws of the company. But, instead, he has discovered that the law ingrafted upon that contract which he was aware he had made, and which he supposed limited the extent of his liability, the further undertaking on his part, not expressed in his written contract, that in case the company became insolvent, and a receiver is appointed, then that he will pay all assessments laid by the receiver for the purpose of paying losses and liabilities of the company, and the services and expenses of the receiver, without limitation, in proportion to the amount of his insurance or interest in the company.

The complainant makes another important allegation in this bill.

He says that the fact is that every person insured in said company, including those who suffered losses, expected that they were liable only to the amount of their premium notes, and in no case could it exceed the amount of said premium notes. By demurring the defendant admits this statement to be true. This is a material allegation, and, if true, ought to be an end of the case, because it shows that every member of the company was laboring under a mistake of law which affected their liability, and which it would be most inequitable for any one of them now to insist upon enforcing. This is a mutual company. The question at issue as to the right of the receiver to assess beyond the premium notes affects no one but the members, and these members entered into contract relations with each other upon the express understanding and agreement that they should not be assessed beyond the amount of their premium notes. There is nothing illegal in such a contract, although the law does provide that in case the company became insolvent there might be assessments made beyond and independently of the premium notes to pay such loss. This provision of the law was made for the benefit of the individual members, and the individual members can waive a benefit given by statute. The case is much stronger when, in ignorance of such law, they mutually agree that the premium note shall be the limit of each member's liability.

If the agent had intentionally misrepresented to the complainant the facts in a material point, which induced him to enter into the contract, he would have been entitled to relief. In *Lycoming Fire Ins. Co. vs. Woodworth*, 83 Pa. St., 223, Mr. Justice Gordon said: "It is true that one insuring in a company, formed on the mutual plan, is bound to inform himself of the rules and regulations of such company: *Mitchell vs. Insurance Co.*, 51 Pa. St., 402. But it is also true that, as to those outside of it, such company occupies no other or better position than one organized on the stock plan. As to one dealing for insurance, such a company is bound, as any other, by the representations of its agent in the making of the contract, for it cannot assume the advantages of his acts, and avoid the disadvantages. The maxim, '*Qui sentit commodum, sentire debet et onus*,' is said by Justice Sharswood, in *Mundorff vs. Wickersham*, 63 Pa. St., 87, to embrace a principle which pervades the law in all its branches. It follows that this company could not profit by the fraud of its agent in inducing the plaintiffs to enter into a contract which they would not have entered into had it not been for such fraud, and it does not help the matter that they were thus made members of the



company, for such membership arises from, but does not precede, the contract."

Under the allegations of the bill it would operate as a great wrong upon the complainant to extend his liability beyond the amount of the premium note signed by him, which it was expressly agreed should limit the utmost extent of his liability; and as all of the members understood their contract in the same way, there is nothing wrong or inequitable in enforcing the contract as made.

I do not feel called upon to determine what would be the liability of complainant under a state of facts different from that made by his bill. I base my opinion entirely upon the facts stated, and by the demurrer admitted to be true. We cannot anticipate that he will be unable to sustain the statements made by proof, if they are denied by the answer that may be interposed. I think the decree of the court below should be reversed, the demurrer overruled, and the record remanded, with leave to defendant to plead in twenty days.

SHERWOOD, J., concurred.

COOLEY, C. J.—I assent to the conclusion reached by Mr. Justice Champlin in this case, upon the express ground that it stands admitted by the record before us that all the parties who became members of the insurance company in question did so upon the express understanding and agreement that their liability was to be limited to the notes given by them respectively.

CAMPBELL, J.—I do not think relief can be granted against a statutory liability.

SUPREME COURT OF PENNSYLVANIA.

*Appeal from the decree of the Court of Common Pleas No. 1, of Philadelphia County.*

CUNNINGHAM

vs.

INS. CO. OF NORTH AMERICA.\*

Section 27 of the supplemental Corporation Act of May 1, 1876, does not authorize the issuing stock to be paid for at par and requiring an additional bonus of the same amount to be paid in cash into the treasury of the company.

The act requires that the increased shares shall be allotted pro rata to the stockholders of the company according to their interest.

The insurance company allowed its stockholders to subscribe for new shares on payment of \$10—the par value of the old stock—and \$10 additional to go to the surplus fund of the company. *Held*, That this was unauthorized by the Act of 1876.

The Act of June 29, 1881, P. L., 121, does not apply to this case, as it was passed subsequently to the action of the company making the increase.

J. WARREN COULSTON and CRAWFORD & DALLAS, for Plaintiff in Error.  
RICHARD C. McMURTRIE and GEORGE W. BIDDLE, Contra.

GORDON, J.

The learned counsel for the respondent in the opening sentence of their counter-statement say: "It was never pretended that the company could, without legislative sanction, increase or diminish the number of shares or par value thereof." From this admission, which we readily indorse as correct, we pass at once to the 27th section of the act of 1876, from which the stockholders of this corporation

\* Opinion filed, February 23, 1885. From *Pittsburgh Legal Journal*.

derived their power to issue the stock shares, the subject of the present controversy. The section referred to reads as follows: "Any existing fire or fire and marine insurance company, and any stock company formed under this act, may at any time increase the amount of its capital stock if authorized so to do by the stockholders holding the larger amount in value of stock, at a meeting specially called for that purpose, of which at least sixty days' public notice shall be given. \* \* \* Increase of stock as aforesaid may be made by increasing the number of the shares of stock or by increasing the par value of the same, and such increased shares or increased par value shall be allotted pro rata to the stockholders of said company according to their interest, and may be paid in whole or in part out of the accumulated reserve of the company in case the condition of the company warrants such allotments, or the same may be disposed of as is provided in this act for the organization of stock companies." The first clause of the latter part of this section is that under which the stockholders acted in providing for the increase of the capital stock of the company which they represented, and the latter clause, which refers to section four, needs no further notice, as it does not enter into the present controversy. To this act, then, and its interpretation, if any it needs, we are confined, for it contains the power under which the stockholders acted, and with it we have but to compare their resolution in order to ascertain whether the condition appended to that resolution was or was not *ultra vires*, for it is utterly useless for us to attempt to be wise above what is plainly written in the statute, and to go wandering off among authorities which can have little or nothing to do with the case.

That they had power to cause the stock to be issued is not denied, and that it was issued is a fact, and so the only question left is, as we have already said, that respecting the lawfulness of appended condition. Were the act of 1881 operative in this contention, there could be no debate about the lawfulness of the stockholders' action; but as we agree with the learned master, that it is not so operative, we dismiss it from the case. Now, in the outstart, this is to be emphasized, the condition is found not in the act, but in the resolution adopted by the meeting of 15th of November, 1880. We cite the resolution, with its condition, as follows:—

"Resolved, that the capital stock of this company be increased \$1,000,000 by the issuing of 100,000 shares at par to stockholders, in proportion of one share for each two shares held by them on the day they shall respectively subscribe for the same—they subscribing an

agreement to pay \$10 per share for the stock, and also \$10 for the privilege of subscribing, the proceeds of which privilege shall be added to the surplus fund of the company." Par, in this connection evidently means 100 per cent premium. Passing, however, so curious an interpretation of the word "par," we ask by what authority did the majority of the corporate meeting impose such terms as these upon the minority? The act is specific, "and such increased shares, or increased par value, shall be allotted pro rata to the stockholders of said company according to their interest." The resolution on the contrary provides that the stockholders shall not have such pro rata allotments unless he pay to the company a bonus of \$10 on each share. But if \$10 could be thus imposed, why not \$20, \$30, or \$50. Under and by the act the stockholders had an important privilege, but under the resolution he has none, or only such as the majority of the stockholders meeting chose, *ex gratia*, to give him. The learned master says: "But they," the plaintiffs, "seem to have overlooked the fact that there is no statutory right to them to subscribe to increased shares, except in pursuance of a resolution of the stockholders to increase." But, on the other hand, the master himself overlooks the fact that these stockholders could only act under the statute, that in their powers were found that by it their powers were limited, and that everything they did beyond it was to no purpose whatever, utterly vain and nugatory. They had no power to append a condition to the statute to suit their own purposes, and to squeeze out of the corporation all those who either could not or would not pay to them their bonus. It is to no purpose to say that even after this shave on their stock, they had still a bargain, for the sole question is, what was their right, and not what was or might have been their profit? The answer to this inquiry may be easily had through the answer to the question, to what would they have been entitled had the resolution been passed in the terms of the act and without the appended condition? Certainly to the stock, clear of the bonus. Again, suppose the resolution had been to double the value of the existing stock instead of issuing new shares? Surely, then, a bonus could not have been compelled, and yet in the act both means of increasing the capital of the company stands on precisely the same footing, and the pro-rata distribution of either is as much the right of the shareholder as is the ownership of his original stock. The act of 1876 was designed not only to enable corporations to increase their business capital, but also to protect the individual stockholder. The resolution, however, under consideration,

not only prevents the statutory idea of protection for the shareholder, but belies itself in doubling what it designates as capital. In this case, contrary to what is affirmed in the old saw, there seems to be a good deal in a name. By the artifice \$2,000,000 are added to the working fund of the corporation, of which \$1,000,000 is said to be capital, and the other, though raised at the same time and by the same means, is called "surplus fund"—earnings of the association! Let those believe this who can or will, and let those who have agreed to the action of the majority of the stockholders abide by that action; but as for the appellants, they cannot be so held. There has been an attempt to deprive them of their statutory rights through an unlawful exercise of an alleged corporate power; an attempt which, without doubt or dispute, a chancellor has the power to restrain, and to refuse an exercise of that power, would, in the present case, be a denial of the appellants' right to have their cause heard and vindicated in a court of equity.

The decree of the court below dismissing the plaintiff's bill and imposing upon them one-half of the costs, is now reversed and set aside at the costs of the appellee, and it is ordered that the said appellee allot to the appellants such an amount of the new stock shares as shall be their proportion under the act of the general assembly above recited, free from bonus or charges, and if they or any of them, have under protest, paid such bonus or charges, for the said stock shares, that the same be refunded to them with interest; that the record be remitted to the court below for the purpose, if necessary, of having an account stated between the parties, and for the full execution of this decree.

Dissenting opinion by Paxson, J.

I do not fully agree with the majority of the court in their construction of the act of 1876. But conceding their view of it to be correct, I would not sustain this bill for obvious reasons. They may be briefly stated as follows:—

1. The complainant has no equity. His object is to get stock at \$10 per share for which other stockholders have in good faith paid \$20. This is not equity, it is inequity.

2. He has a full and adequate remedy at law. For the refusal of the company to allot him his proportion of the stock at par, he may sue at law and recover full damages. He has therefore sustained no injury which the law will not redress in the amplest manner. The

right to particular shares of stock, where other shares can be bought in the market, is not a right which equity will enforce specifically. We have so decided, and it is familiar law: *Foll's Appeal*, 10 Norris, 434.

3. It has been asserted, and it is undoubtedly true, that to enforce the complainants' legal rights in this proceeding would inflict serious confusion upon the affairs of the defendant company. It is a well-settled rule in equity, that a chancellor will not grant an injunction even to enforce a legal right where the injunction will do more mischief than the evil sought to be redressed. This must continue to be the rule so long as his decree is of grace, not of right. Applying this principle to the case in hand, we find that a majority of the stock has already been issued under the arrangement adopted at the stockholders' meeting and cannot be recalled. Upon each share \$20 has been paid in good faith. It requires but a moment's reflection to see that a decree which requires the company to issue the balance of the stock at \$10 must necessarily throw the affairs of the company into confusion and produce the rankest injustice. If this is equity, it is equity misunderstood.

If there were circumstances of oppression in the case, there might be more ground for this severe exercise of power. Nothing of the kind appears. On the contrary, the arrangement was entered into in entire good faith, in the belief that it was legal and under the advice of counsel. Moreover, it was not pretended that all the stockholders were not treated alike. No one stockholder had any advantage over any other. The arrangement was evidently made with a view to the best interest of the company, and in my judgment was wise and conservative. That it was so may fairly be inferred from the fact that the legislature by the subsequent act of 29th June, 1881, P. L., 121, expressly authorized the course of proceeding adopted by the company.

I can readily understand why the complainant did not resort to his remedy at law. The measure of damages would in such case have compensated him, but it would have given him no advantage over other stockholders. By filing this bill he gets his stock at \$10 per share, for which other shareholders have paid \$20, and which is worth in the market \$31. Moreover, he has succeeded in throwing the affairs of the company into confusion.

Against such a mode of administering equity, I enter my solemn protest.

## SUPREME COURT OF IOWA

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*Appeal from Council Bluffs Superior Court.*

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COLBY

vs.

CEDAR RAPIDS INS. CO.\* )

Defendant insurance company issued two policies for the period of five years to M., each providing for cancellation at his pleasure, and stipulating against other insurance. At the end of fifteen months, M., desiring to insure the property in another company, delivered his policies in defendant company to C., with an indorsement upon each in these words: "For value received I hereby assign to C. the unearned premium under this policy, also this policy for cancellation, and authorize him to collect such unearned premium." Eight days latter, C. tendered the policies to defendant for cancellation, but as a dispute arose as to the amount of the unearned premium they were returned to him without cancellation, and he bought suit to enforce payment of the amount claimed. *Held*, (1) That the election of M. to cancel the policies, no notice being given to defendant, and no request being made by him for cancellation, did not create a liability to pay the unearned premiums; and (2) that the policies had been avoided by M. by a violation of their conditions in obtaining the insurance in the other company.

Action to recover unearned premiums. There was a trial without a jury, and judgment was rendered for the plaintiff for a part of the amount claimed. Both parties appeal, the defendant perfecting its appeal first.

DEACON & SMITH, *for Appellant.*SMITH, CARSON & HABL, *for Appellee.*

ADAMS, J.

The undisputed facts are that the defendant company issued to one Murray two policies of insurance for the period of five years,

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\* Opinion filed, June 13, 1888. From *N. W. Reporter*.

each providing for cancellation at his pleasure. At the end of fifteen months he was induced to insure the property in the Phoenix Insurance Company of Brooklyn, New York. As, however, he neither desired nor was allowed to have insurance upon the property in both companies (the policies in the defendant company stipulating against other insurance), he conceived the plan of allowing the policies in the defendant company to be canceled, and of setting up a right of reclamation of the unearned premiums as provided by statute. McClain's St., 299. He also conceived the idea of assigning his claim to the unearned premiums to the plaintiff, the agent of the Phoenix Insurance Company. He accordingly delivered his policies in the defendant company to the plaintiff, with an indorsement upon each in these words: "For value received, I hereby assign to C. H. Colby, Esq., the unearned premiums under this policy, also this policy for cancellation, and authorize him to collect such unearned premium." [Signed] "J. S. MURRAY." Eight days later, the plaintiff, Colby, tendered the policies to the defendant for cancellation, but as a dispute arose as to the amount of the unearned premium, the policies were returned to the plaintiff without cancellation, and this action was brought to enforce the payment of the amount claimed.

The defendant contends that the policies were not canceled, and denies that cancellation was demanded by any one having a right to demand it, and insists that the policies became void, and that there was nothing left to cancel. The court below ruled that these positions were untenable, and certified several questions to this court, the amount in controversy being less than \$100. It will be sufficient for the disposition of the case to set out and determine two of the questions,—the first and fifth. These questions are in these words: "(1) Did the election of the assured, Murray, on July 13, 1883, to cancel said policy, as evidenced by his written assignment to plaintiff of that date, have the effect to terminate the contract of indemnity contained in said policy, and create a liability on the part of the defendant to pay said Murray the portion of unearned premium due upon cancellation, no notice being giving defendant of such election by Murray, and no request being made by him of defendant to cancel same." "(5) Was the contract of indemnity, evidenced by said policy, in force up to the time plaintiff demanded cancellation, on July 21, 1883, or had it been previously terminated by violation of its conditions on the part of Murray." Upon a former hearing of this case a part of the record accidentally failed to come into our



hands, and it was held that the questions certified, so far as they presented anything for our determination, should be answered in accordance with the ruling below. Some doubts, however, arose in regard to the correctness of our holding, and a petition for rehearing having been filed, the same was granted.

It is not clearly apparent, from the judgment rendered, what the precise view was which the court below took of the law of the case; but it is not very material. It is sufficient to say that the court must have held that the policies were not avoided, either by obtaining the Phoenix insurance or by the assignment, and that they were canceled, and that a right to the unearned premium accrued in some way to the plaintiff.

We will consider, first, the effect of obtaining the Phoenix insurance. It is not denied by plaintiff, and could not be properly, that if the Phoenix insurance was obtained before the virtual cancellation of the policies in the defendant company, these policies would be avoided by Murray's act in violating their condition, and there would be nothing left to cancel, and no claim would accrue for unearned premiums. There may, to be sure, be a recovery for unearned premiums in some cases where the risk has never commenced, as where the policy-holder acted in good faith and paid the premium under the mistaken supposition that the risk commenced. See *Waller vs. Northern Assur. Co.*, 19 N. W. Rep. 865, and cases cited.

But the case before us is essentially different. The plaintiff's theory is that the cancellation virtually took place at or before the time of obtaining the Phoenix insurance, to wit, at the time of the delivery of the policies to the plaintiff with the indorsement thereon set out above. If this is so, then it might be conceded that the obtaining of the Phoenix insurance was not a violation of the policies, and would not prevent the plaintiff from recovering if he should appear to be otherwise entitled to recover.

We come, then, to the question as to the effect of delivering the policies to the plaintiff, with the indorsement thereon purporting to be an assignment of the policies to the plaintiff. Was this act virtually a cancellation? We state the question a little differently from what the court did, because we think that this is what the court meant, and because our statement is less ambiguous, and not less favorable to the plaintiff. The assignment, as we have seen, purports to be an assignment "for cancellation." What precisely the assignor's idea was we do not know. The policy is a contract of

indemnity. The effect of an assignment, if it had any validity, should be to transfer the contract, and give the assignee the right to the indemnity. It is difficult to conceive how there could be a valid assignment which would do less than that. Yet the plaintiff contends that the assignment of the contract should be held to have been intended to have the extraordinary effect of terminating the contract as a contract of indemnity. We are unable to see how we could properly give the word "assignment" such force as that. In one way, it is true, an assignment of a policy might have the effect to terminate it. This would be so where it is so provided. The assignment would operate virtually as a forfeiture. As in this case an assignment was prohibited, perhaps an attempted assignment should be held to be a forfeiture. But we do not determine this. What we hold is that, unless the assignment operated as a forfeiture, it would not terminate the policy as a contract of indemnity. It would either be void or carry the policy for all there is in it. Any other view of the word "assignment" would involve an unjustifiable departure from its plain meaning.

But there is another view which leads also to the conclusion that there was nothing done by Murray at the time of the alleged assignment which operated to cancel the policies. Cancellation of a policy is something to be done by the company. This will appear from an examination of the statute which provides for cancellation. No insurance company can do business in this State whose form of policy in use "does not provide for the cancellation of the same at the request of the insured upon equitable terms." McClain's St., 298. This is the only provision on the subject.

Now, while the policies did not expressly provide the mode of cancellation, it is to be presumed that the intention was that the provision should be in compliance with the statute, and that the mode should be that provided by statute. It is the company, then, that is to make the cancellation. The company should be allowed to know what risks it is carrying. It should be allowed to take up a canceled policy, and make the proper entry upon its books. No insurance company could do business long without having the means of proving its rights, and of disproving falsely alleged liabilities.

It may be conceded that a request by the insured to the company to cancel, though not complied with, would be treated by the courts as equivalent to cancellation, so far as the rights of the insured might be concerned. But we cannot hold that the request can be

dispensed with. We do not forget that in the case at bar there was a request, made to cancel. But it was not made by the insured as the statute provides. It was made by the plaintiff. It is probably true that the insured might make such request through an agent. But the plaintiff did not claim to act as Murray's agent, nor would his case be better if he had; because, before he requested cancellation the Phoenix insurance had been obtained, and the obtaining of that insurance must be deemed fatal to the plaintiff's right of recovery unless he can maintain his proposition that Murray's mere election to cancel operates as a cancellation; and we hold that such proposition is not sound.

In answer to the first question certified, we have to say that we do not think that the election made by Murray, July 13, 1883, to cancel, created a liability to pay Murray unearned premiums. In answer to the fifth question certified, we have to say that we think that before July 21, 1883, the policies have been avoided by a violation of their conditions by Murray in obtaining the Phoenix insurance. The court below must have ruled to the contrary upon both questions, and in this we think it erred. The view which we have taken of the case, it appears to us, must make virtually a final disposition of it, and for this reason we do not determine all the questions presented.

Reversed.

## SUPREME COURT OF COLORADO.

POMEROY

vs.

ROCKY MOUNTAIN INS. CO.\*

The fact that an assured, at the time of his insurance, was intemperate to such a degree as to impair his health, avoids the policy if the same contain a condition that if the party insured should become so far intemperate as to impair his health, the policy should be void ; and the knowledge of such fact, by the agent of the company, will not operate to estop it from relying upon the violation of such condition, as a defense to an action on the policy, or be regarded as a waiver thereof, if, at the time of the execution of the policy, the party in whose favor the same was issued also knew of such fact.

Error to the district court of Arapahoe County. The opinion states the facts.

STUART BROS., *for the Plaintiff in error.*

W. W. COVER, and B. F. HARRINGTON, *for the Defendant in error.*

HELM, J.

A judgment was rendered in the court below against plaintiff, upon demurrer to his amended complaint, to reverse which this writ of error was sued out. All of the material facts well pleaded in the complaint are, therefore, admitted. One of the several matters argued is in our judgment decisive of the case, and we shall, therefore, consider no others. The complaint avers, *inter alia*, the following facts, viz., that a condition in the certificate of insurance or policy was that if the party insured should become so far intemperate as to impair his health, or induce delirium tremens, the certifi-

\* Opinion filed, June 17, 1885. From *W. C. Reporter*.

cate should be void; that at the time of the renewal of the policy the assured was intemperate, and that his intemperance was such as to impair his health; but that Johnson, the agent, who renewed the policy, was familiar with the habits of the deceased, and then had full knowledge of the latter's intemperance and the impaired health resulting therefrom. The complaint also avers that the only ground of refusal to pay the amount of the policy was, that "the deceased either died from delirium tremens or became so intemperate as to impair his health;" likewise, that deceased did not die of delirium tremens.

The question presented by these averments and the demurrer thereto is this: Was the condition in the certificate regarding intemperance waived? or, putting it in another way, did the knowledge of Johnson and his acts in the premises operate to estop the company from relying upon the violation of this condition as a defense?

We are disposed to treat the revival or renewal of the certificate after its forfeiture for non-payment of dues as similar so far as the above question is concerned, to the making of the contract of insurance in the first instance; hence we are not to consider the waiver of a cause of forfeiture occurring after the contract is made, but the waiver of a material condition therein at its inception. This distinction should be borne in mind, because here is a marked difference in law between the act of the insurer in receiving premiums, assessments, or dues, with knowledge of the subsequent violation of a material condition which was originally placed in the policy solely for his benefit, and the waiving of such condition at the inception of the contract; it, the condition, nevertheless being inserted into the writing which is executed and accepted by the parties.

The plaintiff in this case, who is the assignee of the policy, and who procured the renewal must be presumed, notwithstanding his disclaimer on the subject, to have known the contents thereof when it was reviewed or renewed; no fraud or deception being practiced upon him, the law will not permit him to say that he was ignorant of the conditions contained in the contract.

We must assume also, that he, as well as the agent, Johnson, was aware of the assured's impaired physical condition when the contract was renewed, there being no averment in the complaint to the contrary.

It is therefore true that plaintiff paid the premium for the revival of the policy, and took the assignment thereof with knowledge of

the condition mentioned, and also with knowledge of the fact that the cause of forfeiture thereunder already existed, and went into the transaction with his eyes open; he was not deceived or misled as to the condition question; nothing is disclosed by the complaint to show that it was alluded to or discussed by himself or the agent. He now insists that solely by reason of Johnson's knowledge of the assured's intemperance and impaired health, his principal is estopped from asserting the forfeiture.

It is clear that a gross fraud was practiced upon the company. This is one of the leading grounds of forfeiture; it is a matter of vital importance by way of protection to the insurer; this condition is of such a nature that the presumption of waiver should rest upon strong and unusual circumstances. We would about as soon expect a fire insurance company to waive the condition rendering a policy void, if the fire occasioning the loss be voluntarily set by the owner of the property for the purpose of obtaining the amount of the risk. Plaintiff, as a man of ordinary good sense, must have known that no renewal of the policy would have been permitted, had the company been actually advised of the existing circumstances. If he was acting in perfect good faith he should at least have insisted on striking this condition from the contract. The situation here disclosed is wholly unlike that existing under certain of the decisions cited by counsel for plaintiff in error, where the assured or the plaintiff was the innocent victim of deception practiced by avaricious and unscrupulous agents.

As suggested already, a fraud was practiced, or attempted to be practiced, upon the company by its agent. If plaintiff and the agent actually conspired together to consummate this fraud, of course the former cannot recover. If the agent alone possessed the wrongful intent, and such, probably, was the fact, plaintiff, through his own negligence, became the instrument by which the fraudulent contract was made.

It would seem that in procuring the renewal plaintiff must have relied upon one of two contingencies happening in case of the assured's decease—either that the company would not discover the fraud of its agent or that the law would create an estoppel by reason of the knowledge of Johnson, against its relying upon this defense. It either view, he can hardly be regarded as entirely innocent. Under all the circumstances here presented, we do not deem this an appropriate case in which to apply the doctrine of estoppel, or waiver through the knowledge and conduct of agents, recognized

by the Supreme Court of the United States, and by many of the States courts of last resort.

The general rule is that parties must be held to the solemn declarations contained in their written contracts; that parol proof of matters occurring prior to, or at the time of executing such contracts, but embodied therein, will not be admitted to contradict or vary the terms thereof. We are aware that to this rule there seem to be exceptions, and that these so-called exceptions are sometimes recognized in insurance cases. But it is said that even then the courts do "not admit oral testimony to vary or contradict that which is in writing;" that the reception of this kind of proof rests "upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances as estopped that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it:" Mr. Justice Miller in *Union Mutual Insurance Company vs. Wilkinson*, 13 Wall., 222.

In the case alluded to the discussion arose through a false answer to an interrogatory in the application; a question calling for the cause of the mother's death, and her age at the time, was answered by both the assured and her husband to the effect that they had no knowledge whatever on the subject; but the agent after interviewing of bystanders, wrote the answer that she died of a fever at the age of forty years; upon the trial of the suit brought to recover the amount of the policy it was proven that the mother died at the age of twenty-three years; there was also evidence that her death resulted from consumption, but the jury did not so find. The court sustained the recovery.

As to what would have been held had it appeared that the assured and her husband, for whose benefit the policy issued, then knew the cause of her mother's death and her age at the time, we are of course not advised. When the application, which is a part of the contract as much as the policy itself, was signed, the applicant was not aware that the answer was false, having heard the statements of the party questioned by the agent, he probably believed them to be true. Besides, in writing down this answer the agent acted entirely upon his own responsibility, it is a very different case even from that where the applicant himself innocently gives a false answer to

a material question, upon which answer the agent and the company rely.

By analyzing the extract above given from the decision in thirteenth Wallace, it will be seen that there must be inequitable circumstances such as substantially render the applicant himself the innocent victim of imposition or fraud; what else could prevent the use of the instrument against him or estop the other side from relying upon its contents.

We have examined the decisions cited and diligently searched for others, but have found none which rest upon facts similar to those now before us; so far as we have discovered, the doctrine of adjudicated cases would hardly warrant us in sustaining the view that a waiver of the condition under consideration took place or that an estoppel to the company's reliance upon it can be held to exist. It has been unnecessary for us to discuss generally the doctrine of estoppel, or waiver through the acts of the officers or agents of insurance companies. Neither have we deemed it important to consider the difference, in this respect, held by some courts to exist between the "old line," or stock insurance corporators, and the mutual association or company, to the latter of which classes defendant belongs. If we were to accept the view of those courts which hold mutual companies to the highest degree of responsibility for the conduct of their officers or agents, still we could not sustain plaintiff's position. For, as already shown, he is not before us in the attitude of one who without fault on his part is the innocent victim of imposition or misrepresentation practiced by an unprincipled agent.

The judgment is affirmed.



## UNITED STATES CIRCUIT COURT, S. D. OF IOWA.

CHARLES L. WILLIAMS, ADM'R.

vs.

NORTH GERMAN INS. CO. AND

TWO OTHER COMPANIES.\*

The policy insured the K. elevator company, loss payable to W., administrator.

The elevator had been sold under a decree of court and had been bought in by W. subject to redemption within a year. Prior to the fire the title had passed to W. through the failure of the elevator company to redeem.

*Held*, That the interest of the company insured having absolutely ceased, the policy became void.

It appears, however, that the facts regarding the title had been fully explained to the agent who filled the policy, and he had agreed to insure the interest of W.

*Held*, That a court of equity would reform the contract to agree with the understanding of the parties.

*Held*, That where the agent knew the ground was leased, a policy provision rendering it void on that account was waived.

*Held*, That where an elevator was being used at intervals and men were at all times around it, it was not vacant.

MILLER, J.

The plaintiff Williams obtained policies of insurance against the risk of fire, on what is known as the Keokuk Elevator. The policies read that the Keokuk Grain Elevator Company is insured against loss by fire to such and such amounts, and the loss, if any, is payable to Williams, administrator. C. L. Williams is and was administrator of his father's estate. At the time of the insurance, at the time it was made, the elevator property had been sold under a decree of this court, and had been bought in by Williams as

\* Decision rendered, July 7, 1885

administrator for the estate. He bought it in and held the certificate of purchase, liable and subject to redemption at the end of the year from the date of sale. The condition of the title therefore, was that the legal title was in the Keokuk Grain Elevator Company and the interest of a purchaser under a defeasible claim was in Williams as administrator of his father's estate. Before the twelve months for which the insurance was to run had expired, it was obvious that the condition of the title must be changed, either the elevator company must redeem and have a clear title to the property before the policy expired or, failing to redeem, Williams would receive the deed and divest all rights of the elevator company. What took place was that the company did not redeem; that Williams received the deed to the property, and after he had got the deed, the elevator company being divested of all title, the fire took place, but during the life of the policy. All lawyers know that the elevator company having no interest in the property at the time of the fire, was not insured and could not collect any money, and could not even bring any suit for such recovery. Nor did the clause "Loss, if any, payable to C. L. Williams," change the legal relation. The loss mentioned in that form of policy was the loss of the Keokuk Grain Elevator Company. If this fire had taken place before the expiration of the time of redemption, the policy would have been just what it should have been. It would have expressed the loss of the elevator company. It would have been its loss. The loss should have been payable to Williams, but since the elevator company had no interest in it when the fire took place, there was no loss to it, and Williams was not insured by the policy.

Williams has filed a bill in chancery averring that the language of the policy in that respect did not represent the contract which was made. He avers that he made a contract with Maxwell, the insurance agent, to insure him and his interest in the property. He avers this with sufficient precision, and he swears to it in various forms and shapes, and other testimony is taken on the subject. The first question to be considered, was whether, admitting the statements of the bill to be true and taking for granted the testimony of Williams, whether it was a chancery case. I remember the old decisions in the chancery courts of England on the subject, that a written contract cannot be reformed in equity for a mistake in law. That is all the branch of the subject that embarrasses me to-day. But, without examining authorities abroad, the decisions of the Supreme Court of the United States, which must govern me, I am

inclined to think that doctrine has been much narrowed in modern times. Without going to great length at the present time I shall state it about this way. Where an instrument fails to represent what both parties intended to have it represent, and it had devolved on one party to draw up the instrument, and the other party merely accepted it, and it does not represent the views of both parties, and if the fault of the instrument was on the part of the party drawing it up, it can be reformed. It would be a harsh rule if person applying to an insurance agent, who is supposed to know the legal value of all such policies which he is drawing up every day, and who is supposed to know exactly what is desired, if that agent fails to draw up what was intended to be drawn, it would be harsh to say that that instrument shall not be reformed, and that chancery shall not reform it.

The testimony on that subject, although very well handled by the counsel for the companies, leaves no shadow of doubt on my mind that both parties intended to insure the executor of his father's estate in that property. The writing of the instrument did not stand in the way at all. I think that every one not familiar with rules of law would say that the policies saying that loss, if any, was payable to Williams, that Williams was insured, but that is a mistake.

Williams testimony is broad and full and clear that he communicated to Maxwell the exact condition of this property as I have recited it, that there had been a decree and a sale, and that he held the certificate of sale; that it would expire during the term and he would get the title. All these particulars he explained to Maxwell, and he told Maxwell he wanted his own interest insured, and Maxwell so understood it. Williams' brother swears to the same thing. He was present, that the whole thing was explained to Maxwell more than once; the clerk in the office of Maxwell confirms this statement; he was present, he wrote out the policies, and he questioned Maxwell about the thing being done, doubted the sufficiency of the language, and Maxwell told him to so fill it out that way that it effected the object.

When the fire took place Williams went to Maxwell and had a talk with him, Maxwell confirmed his statements in writing.

For some reason it seems Williams knew Maxwell better than some others, and he had Maxwell go for a notary public and the witnesses swear that certain interlineations were made at his suggestion. What would this establish? And yet Maxwell, after getting

to California and under contract of re-employment, swears he never heard about this question regarding the title. I do not care to discuss such testimony. I am therefore satisfied that the story of Williams is in the main true; that Maxwell understood the character of the title to the property, and that he was requested to provide for that state of things, and he carelessly made the policy as he did and as it stands to-day. Some authorities are read, something about need of absolute proof in order to reform a legal instrument, but I do not attach any importance to these as I am perfectly satisfied that the contract on which this policy was executed was such as to demand the reformation of the policy. I therefore hold that it should be reformed so as to express the fact that the interest of Williams was insured.

One or two other questions are presented and about them I have more difficulty. I thought at one time that I would reform the policy and go no further. One of these was the provision as to leased grounds; that the policy should be void unless that fact was expressed, and also if the property ceased to be occupied during the term of the policy should become void unless the company was notified and gave its consent. The bill seeks to reform the policy in both of these particulars and asks the insertion in the policy that it was known to be on leased ground and was to be permitted to be vacant at times. I do not think that, having reformed the policies as to the interest insured, that these questions are such as need reformation. I think they can be waived and the company estopped by its own transactions from asserting them.

But I think it better in these chancery cases to dispose of the whole case if possible, and I therefore think there is no need of a jury on these questions. I am satisfied that Mr. Maxwell knew very well that this was leased ground, that his attention was called to it, and that he made the insurance with that understanding. Therefore, the company waived that part of the contract.

The lease was not from a private citizen, but from the city of Keokuk, which could not be supposed to have any interest in the burning of the property or its destruction in any way. And this fact of the leased ground was known to the whole board of insurers.

As to the occupancy of the building, if I was juror I should say that the property was occupied, that the elevator remained there with its machinery, sometimes used and sometimes not used, as it had been for years. The cessation from use simply meant that no steam was up and that nobody went there to work, but men were

around there all the time and Williams went there frequently, had his papers there, and I think that I as a juror, would say, notwithstanding some part of the time they were not using the elevator, it was not vacant as an elevator.

But it is claimed that Maxwell knew this and nobody could tell when it would be vacant. Brookings had it at the time of the insurance, and I think that no juror could be justified in saying that these conditions are not waived.

On the whole, then, I am satisfied that this company contracted to insure the interest of Williams in these three policies; that the language of the policies, failing to express that, should be reformed to make them express that. Therefore, the other objections are not valid, and a decree should be entered for the complainants accordingly.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Bucks County.*

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WRIGHT

vs.

SUSQUEHANNA MUT. FIRE INS. CO.\* }

A policy of insurance provided—1st, That arbitrators are to be chosen at the request of either party in writing, and, 2d, That no suit shall be commenced until an award shall be obtained fixing the amount of the claim “in the manner hereinbefore provided.”

*Held*, That the one clause must be read with the other, and if there was no written request for arbitration given, it will be presumed that it was waived, and a suit at law may be brought without first referring it to arbitration.

WILLIAM & J. C. STUCKERT, and A. & J. FACKENTHALL, *for Plaintiff in error.*

HENRY LEAR, GEORGE ROSS, and L. L. JAMES, Esqs., *for Defendant in error.*

PAXSON, J.

The learned judge of the court below rests his judgment of non-suit upon the single ground that the suit was prematurely brought. It was an action of covenant upon a fire policy to recover for a loss sustained by the plaintiff. The policy contained the following stipulations: “In case differences shall arise touching any loss or damage, after proof thereof has been recorded in due form, the matter shall, at the written request of either party, be submitted to impartial

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\* Opinion filed, May 25, 1885.

arbitrators, \* \* \* but the arbitrators shall not decide as to the validity of the contract, the liability of the company, or any other question, except as to the amount of such loss or damage. \* \* \* It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery, until an award shall have been obtained, fixing the amount of such claim in the manner hereinbefore provided," etc.

The language quoted is all that is essential. At the time the action was commenced below there had not been an award under the foregoing clause, nor had any step been taken by either party to procure one. The court below held, that under the policy an award was a condition precedent to the right to sue.

Few of the authorities cited have any bearing upon the case, for the reason that the condition in the policy is peculiar, and must be construed according to its terms. It will be observed: 1. That the arbitrators are to be chosen at the request of either party, in writing; and, 2. That the condition that no suit shall be commenced until an award shall be obtained, fixing the amount of the claim, uses the language, "in the manner hereinbefore provided." This means, if it means anything, that upon the written request of the company, the plaintiff shall join them in choosing arbitrators and procuring an award before he shall commence suit. It was the right of either party to demand arbitration; it was the right of either party to waive it; and the defendant, having made no such demand, must be presumed to have waived it. The one clause in the policy must be read in connection with the other; the one refers to the other, and relates to the same subject-matter.

In *Mentz vs. Armenia Fire Insurance Co.*, 29 P. F. S., 478, there was a condition in the policy which absolutely required an arbitrator to settle the loss in case of dispute, and that no action should be brought until after such award made. It was held, however, not to be binding. It was said by Mr. Justice Sharswood: "Such an agreement, like any other agreement of reference, is revocable, though the party may subject himself to an action of damages for the revocation. It is not in the power of the parties thus tooust the courts of their general jurisdiction, any more than they have to a personal covenant that they are not to be responsible for a breach of it:" *Farnivall vs. Coombes*, 5 Mann and G., 736. The Supreme Court of the United States have recognized the soundness of this general principle in *Insurance Company vs. Morse*,

20 Wallace, 445, in which they held that an agreement by a foreign insurance company, in conformity with a State statute, that if sued in a State court they would not remove the suit into the Federal court, was invalid. *Flaherty vs. Insurance Co.*, 1 W. N. C., 352, was cited as sustaining the opposite view. The condition of the policy was not given in that case, and, as reported, it is of very little value in this connection, for the reason that we are left in considerable doubt as to what the case really was. In *German American Ins. Co. vs. Steiger*, 13 Insurance Law Journal, 546, the condition in the policy was substantially similar to the one in this case, and it was held "that such written request was a condition precedent to the appraisal award, and that there not having been a written request by either party for an appraisal and award were not necessary, under the conditions, in order to entitle the plaintiff to a recovery."

The learned court did not attach much weight to the second reason urged by the defendant as a ground of nonsuit, and it may be dismissed with the remark that, under the evidence, the question raised was entitled to be passed upon by the jury.

The judgment is reversed and a venire facias de novo awarded.



## UNITED STATES CIRCUIT COURT.

NORTHERN DISTRICT OF NEW YORK.

INS. CO. OF STATE OF PA., *Appellant*,

vs.

PROCEEDS OF SALE OF BARGE WABAUSHENE, *Appellee*. }

A maritime lien not recognized by the law of the place of contract on which it is based will not be enforced elsewhere.

An insurance company has no maritime lien upon the vessel for unpaid premiums.

WALLACE, J.

In deciding against the application of the insurance company to be paid the premium due upon the marine policy issued by it upon the barge out of the proceeds arising from her sale in the registry of the court, the learned judge of the district court held that the contract for insurance was made in Canada and the rights of the parties to a lien were controlled by the *lex loci contractus*. He also held that such a lien was not recognized by our jurisprudence, and that the statutes of this State creating a lien for premiums in favor of underwriters do not apply to foreign vessels. He therefore held that as the company had no lien by the law of Canada it could assert none here. These conclusions are fully approved, and it seems superfluous to attempt to reinforce the reasoning of the very able and careful opinion of the district judge further than briefly to indicate the reasons which have led this court to deny the existence of the maritime lien for insurance premiums.

As early as 1815, Mr. Justice Story decided in *DeLovio vs. Boit*, 2

Gall, 398, that a policy of insurance upon a vessel was a maritime contract in an opinion which has been characterized as "a learned and elaborate essay on admiralty jurisdiction and one of the most luminous views of the subject extant." 2 Hoffman's Course of Legal Study, 465, 2 ed. Although the doctrine of that case was not uniformly accepted (*Ramsey vs. Allegre*, 12 Wheat, Johnson, J., 638), the jurisdiction over such contracts was always maintained subsequently in the first circuit and was generally approved by commentators of authority: *Gloucester Insurance Company vs. Younger*, 2 Curtis, 22; *Hale vs. Washington Insurance Company*, 2 Story, 176; *Dunlap's Admiralty Pr.*, 431; *Kent's Commentaries*, 270 (notes); *Benedict's Admiralty*, sec. 294; *Conklin's Pr.*, 13. Yet until the decision in the *Dolphin*, 1 Flippin, 580, as is conceded in the opinion of the court in that case, the general understanding of the profession was adverse to the existence of a lien for the premium secured by such a contract. In that case reasoning from analogies and influenced by the views recently declared by the learned judge of the sixth circuit that every maritime agreement upon principle should bind the ship as well as the owner. In *Williams' Brown's Ad. Rep.*, 208, the court held the lien should be recognized as extending to the premiums for insurance. It was said by Mr. Justice Curtis (*The Kiersage*, 2 Curt. C. C. Rep., 424) "to be a settled rule that privileged liens constituting a jus in re accompanying the property into the hands of bona fide purchasers and operating to the prejudice of general creditors, are matters stricti juris, which cannot be extended from one case to another argumentatively or by analogy or by inference. And he cites *Pardesus* (*Droit Civ.*, vol. 3, 597, 598) when reasoning on the policy of allowing the privilege for premiums of insurance. Analogy cannot afford a decisive argument, because privileges are a strict right. They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another." The same citation is quoted with approbation by Mr. Justice Grier in *Vandewater vs. Hill*, 19 Howd., 89.

Although the proposition is generally true that maritime contracts import a hypothecation of the ship for their performance, the important qualification must not be overlooked that the lien does not extend to contracts which do not aid the vessel, but are merely for the personal benefit of the owner. One reason why the master of a vessel, clothed as he is with almost plenary powers to represent the

owner, even to the authority to sell the ship when necessity justifies a sale, cannot enter into a contract for insurance, is because such a contract does not aid the vessel. It inures solely to the personal interest of the owner. Unlike contracts and engagements in which every lien holder has an interest because they fortify his security, the contract of insurance contributes to no fund for the general benefit, and its fruits are monopolized by the owner. It has been held in this court that he is not required to surrender the insurance to a trustee under the statutes limiting the liability of a vessel owner for the benefit of those having claims against the vessel when the vessel is lost after liability accrues (Norwich and New York Transportation Company, 17 Blatch., 321 ; Thomenson vs. Whitwell, 21 Blatch., 45) because it is not an "interest" in the ship.

For the reason therefore that a lien should not be extended to a contract to which it is not generally supposed to adhere, even if the analogies should justify recognizing it, and also because the contract of insurance is peculiarly distinguishable from the class of maritime engagements which import a lien, the court cannot follow the decision in the case of the *Dolphin*. The question of a maritime lien was not involved or discussed in the case of the *Guiding Shaft*, 9 Fed. Rep., 521, affirmed 19 Fed. Rep., 263, cited as an authority in favor of the lien.

The note of Mr. Flippin to the case of the *Dolphin* presents all the arguments for denying the existence of the lien and for following the case of the *John T. Moore*, 3 Woods, C. C., 61, to which it is necessary to refer.

The decree of the district court is affirmed.

## LOWER COURT DECISIONS.

### WIDOW AS AN HEIR.

*Cincinnati (O.) Superior Court, General Term.*

MARIAN JAMIESON

vs.

KNIGHTS TEMPLAR AND MASONIC MUTUAL AID ASS'N.

The widow is the beneficiary of a policy of insurance in a mutual association upon the life of her husband payable to "his heirs," when he leaves brothers and sisters, but no children.

HARMON, J.

Plaintiff's husband died, leaving a brother and sister, but no children. His life was insured by defendant in favor of "his heirs." The only question is whether plaintiff is entitled to the insurance money.

Associations like defendant can make their policies payable only to "the family or heirs" of deceased members. R. S., §3,630; 29 O. S., 399; 38 id., 7 and 281.

It is manifest that the word "heirs" in the statute and in the policy is used merely to indicate the persons who are to receive the proceeds of the policy. They do not take the money by descent but by contract.

Who then are the "heirs" of the deceased here? At common law one's heirs are the persons who would inherit his real estate by right of blood. Our statute of adoption and that of descent have enlarged the meaning of the word so that it may include persons not of the

blood of the intestate. R. S., §§ 3,140, 4,159. The wife, if there be no children, is the heir of her husband: *Hunt vs. Brower*, 18 O. S., 311. Neither by common law nor statute has the word any reference to the distribution of any personalty. The word "heirs" therefore in the policy designates as beneficiaries the person or persons to whom the real estate of the insured would have passed under our statute of descent, whether akin to him or not.

That statute, however, provides different courses of descent for ancestral and non-ancestral property, §§ 4,158-9. His wife would, under the facts here, be heir to the latter, not to the former. By which shall we be governed? It seems to us that every reason and analogy point to the latter. By that, if the deceased had left realty, she, not the brother and sister, would have taken it as heir. She therefore is the beneficiary of the policy.

It is argued that if the insured had intended the policy for her he would have named her, as he no doubt might have done, she being one of his "family," or at any rate, would not have used the plural "heirs." But it is not necessary for plaintiff to maintain that her husband had such intention. He meant what he said, that whoever might prove to be his heirs, and *nemo est hæres viventis*, should have the benefit of the policy. They might be one or more. She might and might not be one of them.

Judgment for plaintiff.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### AGENT.

§ 153. *LIFE.*—*Proof of the Relation of Principal and.*—The relation of principal and agent can be created only by contract. The existence of the relation may be established by proof either of an express contract between the parties creating it, or of such a course of conduct by them as raises an inference or presumption that they have entered into it.

*Storm Lake Bank vs. Missouri Valley Life Ins. Co.*

Rep'd Jour'l, p. 781.

IOWA S. C.

### APPLICATION.

§ 154. *LIFE.*—*Burden of Proof.*—*Construction of What Constitutes a Complaint of Blood Spitting.*—*Medical Statements in Proofs of Death Privileged.*—An answer pleading breach of war-

ranty in making false answers to application, casts the burden of proving their truth upon plaintiff.

Continental Life Ins. Co. vs. Kessler, 84 Ind., 310.

The application must be strictly construed against the insurer. To constitute "a complaint" of blood spitting within the application, the blood spitting must have been of the nature of a disease. A question whether there had been any spitting of blood merely, or such a symptom of disease would have required the disclosure of a single instance, but not so "a complaint" of blood spitting.

Citing and discussing, Conn. Mut. Life Ins. Co. vs. Union Trust Co., U. S. C. C. Law Reg., January, 1885. Geach vs. Ingall, 14 Mus. & W., 95, s. c., 2 Life & Ac. Ins. R., 306; Insurance Co. vs. Miller, 39 Ind., 475, Vase vs. Eagle Life etc. Ins. Co., 6 Cush., 42; Cushman vs. Ins. Co., 70 N. Y., 72, and authorities cited.

A single instance is but an evidence tending to show disease. Statements by a physician in the proofs of death which are of the nature of privileged communications, are not admissible.

Penn. Mut. Life Ins. Co. vs. Wiler, *supra*; Masonic Mut. Benefit Ass'n. vs. Beck, 77 Ind., 203; Conn. Mut. Life Ins. Co. vs. Union Trust Co., *supra*.

*Drier vs. Continental Life Ins. Co.*

Rep'd Jour'l, p. 786.

IND. U. S. D. C.

#### APPLICATION.

§ 155. LIFE.—*Acceptance by Agent of Unauthorized Company is not a Contract.*—The acceptance of an application by the agent of a foreign company, who was authorized only to receive premiums and forward applications, is not making a contract of insurance. The contract is not consummated until the application has been accepted by the company and the policy issued, and the place of acceptance is the locus contractus.

Citing and discussing *Armstrong vs. State Insurance Company*, 59 Iowa,

215; Dickenson County vs. Miss. Valley Ins. Co., 41 Iowa, 286; Critchell vs. American Ins. Co., 69 Iowa, 404, 176; Reynolds vs. Continental Ins. Co., 36 Mich., 121; Morse vs. St. Paul F. etc., 21 Minn., 407.

*Beneo et al. vs. Yesler.*

Rep'd Jour'l, p. 787.

OREGON S. C.

#### ASSIGNMENT.

§ 156. LIFE.—*Of Wife's Policy to one Having no Insurable Interest is Void.—Right of Recovery.*—When a husband, who is named as beneficiary upon a policy of insurance on his wife's life, assigns the same to a purchaser for a speculative purpose only, and such assignee receives the amount of the policy upon the death of the insured, the husband is entitled to recover from him such amount less the sum paid by him for assessments and annual dues on the policy.

*Wegman vs. Smith.*

Rep'd Jour'l. p. 785

PA. S. C.

#### BENEVOLENT ASSOCIATION.

§ 157. LIFE.—*Construction of Constitution as to Examination of Claims.*—The defendant is a benevolent corporation, its object in part being the relieving and assistance of its sick members, who were entitled, under certain conditions, to an allowance during their illness. Its constitution provided that no money should be withdrawn unless by a majority of the board of trustees, to whom was also given power to examine all claims of members for sick allowance, and if found correct, to order the same paid. *Held*, That the plaintiff, when he became a member of the society, assented to these provisions of constitution, and could not maintain an action to recover the amount of his sick allowance without having first given the trustees an opportunity to examine his claim.

*Robinson vs. Irish-American Benevolent Society.*

Rep'd Jour'l, p. 790.

CAL. S. C.



## BROKER.

§ 158. FIRE.—*Not the Agent of the Insured to Receive Notice of Cancellation.*—Where a policy of insurance procured through a broker contained the following conditions, viz.: "If any broker or other person than the assured have procured the policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect;" *Held*, That notice from the company to the broker who procured the policy, of an election to terminate the insurance, was not notice to the assured.

*Grace vs. Insurance Co.*, 109 U. S., 278; s. c., 3 Sup. Ct. Rep., 207.

*Kahler vs. New Orleans Ins. Co.*

*Rep'd Jour'l*, p. 738.

Mo. U. S. C. C.

## CARRIER.

§ 159. FIRE.—*Effect of Bill of Lading on the Insurance Contract.*—*Subrogation of.*—*Effect of Insurance on Rights of.*—*Liability of.*—*Insurance Interest of.*—When a bill of lading and an insurance policy covering any loss of the goods named in the former are signed at the same time, but the policy describes the property as having been already shipped by the carrier, the insurance company will be held to be effected with notice of any reservation in the bill of lading and chargeable with notice of the circumstances of the contract for its transportation entered into between the shipper and the carrier. Therefore, the insurance company is held to have contracted with the full understanding that in case of loss of the property while in charge of the carrier, and that loss was satisfied by said carrier, it would be entitled to the insurance due upon the property. To an action by the shipper for the value of the goods the carrier could not plead that it was not liable because of the insurance, and that the shipper must look to the insurance company. In taking insurance the carrier does not limit its common-law liability to the shipper for any loss that may occur. There is no

contract of exemption against liability for loss by negligence; no agreement that the carrier shall be indemnified, but the contract is simply that in the contingency of insurance, a consequent benefit in case of loss will result to the carrier.

*Rintoul vs. R. R. Co.*, 16 Am. & Eng. R. R. Cas., 144.

The carrier has the right to insure the goods in his charge by a contract made directly with the insurance company, and this he may do to the extent of their full value.

*Fland. on Ins.*, 380; *May on Ins.*, 80; *Lawson on Con. of Carriers*, 391, 392; *Hutchinson on Con. of Car.*, sec. 429; *Van Natta vs. Ins. Co.*, 2 Sandf., 990; *Ins. Co. vs. Cobbs*, 20 N. Y., 177.

As between the insurance company and the carrier, the former is liable to the latter for any loss of goods occurring.

*Caestian vs. Ins. Co.*, 16 Am. & Eng. R. R. Cas., 142.

*British & Foreign Marine Ins. Co. vs. G., C. & S. F. R. R. Co.*

*Rep'd Jour'l*, p. 776.

TEXAS S. C.

## DESCRIPTION.

§ 160. FIRE.—*Meaning of "Stock of Rags" etc. May be Proved by Usage.*—A junk dealer was insured "on his stock of rags, old metals, bones, and barrels." *Held*, That he might prove by a general usage of the trade that the terms included other articles than those specified, and a jury might infer from such usage, if of long continuance, that the insurers knew the technical meaning of the terms.

1 Greenl., Ev., § 295; *Macy vs. Whaling Ins. Co.*, 9 Met., 354; *Daniels vs. Hudson River Ins. Co.*, 12 Cush., 416, and cases cited. *Howard vs. Great Western Ins. Co.*, 109 Mass., 384; *Croncher vs. Wilder*, 98 Mass., 322; *Astor vs. Union Ins. Co.*, 7 Cowen, 202.

*Mooney vs. Howard Ins. Co.*

*Rep'd Jour'l*, p. 731.

MASS. S. J. C.

## DEVIATION.

§ 161. MARINE.—*Transshipment Releases Insured through Ship-owners.—Authorized by Bill of Lading.—Liability.—Bill of Lading not Binding when.*—A marine policy of insurance implies a warrant that the vessel shall not deviate from the voyage declared in the policy. Any voluntary deviation is a change of the risk, and forms a departure from the contract, the legal effect of which is to discharge the insurers from liability for any loss happening to the thing insured subsequent to the unauthorized deviation.

Maryland Ins. Co. vs. Leroy, 7 Cranch, 80.

By the breach of his implied warranty against deviation from the voyage, the owner of the ship becomes liable to the owners of the goods in case of loss.

Crosby vs. Fitch, 12 Conn., 410; Goddard vs. Mallory, 52 Barb., 87; Maggie Hammond, 9 Wall., 458; Trott vs. Wood, 1 Gall., 442; Shipton vs. Thornton, 1 P. & D., 216, 231; s. c., 9 Ad. & E., 314, 332; Wilcox vs. Parmlee, 8 Sandf., 610; Emerigon on Ins., 339; Lee's Law of Ship. and Ins., 412.

The defendant insured certain wheat on the steamer *Colorado*, for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong, and thence by the usual "connections" to Batavia; it was the usual practice for the company's steamer to carry its cargo to Hongkong without transshipment at Yokohama, or connecting for that purpose, with any other vessel, at the last-named port; such usage was well known to the defendant when it issued the policy. *Held*, That a transshipment of the property insured at Yokohama was a deviation from the policy and released the insurer from liability thereunder for a loss subsequently incurred. This result follows, although the bill of lading, the form of which was well known to underwriters in San Francisco, provided that the carrier might transship at Yokohama, in the absence of proof that it had ever before made such transshipment. A provision in a bill of lading reserving the right to the carrier to transship at an intermediate

port, is not binding on the consignor, under section 2,176 of the civil code, unless he expressed his assent to it by signing the bill of lading.

*Schroeder vs. Schweitzer Lloyd.*

Rep'd Jour'l, p. 758.

CAL. S. C.

## INSOLVENCY.

§ 162. *LIFE.—Law Authorizing a Receiver Constitutional.—Purchase and Sale by Corporation of its own Stock.—Surrender of Part-paid Stock.*—The law of Illinois authorizing the appointment of a receiver by the court in case of the insolvency of a life company is constitutional, and where the petition sufficiently sets forth the necessity, an injunction may issue against further business and a receiver be appointed before final hearing. A corporation may in good faith, purchase and sell shares of its own stock. But fraud would vitiate the sale.

Ward vs. Farwell, 97 Ill., 593; Chicago, Pekin & S. W. R. R. Co. vs. Marseilles, 84 Ill., 145 and 643; Catlin vs. Republic Life Ins. Co., 86 Ill., 220.

A stockholder selling his stock to the corporation will be protected against further payment of his subscription unless impeached for fraud on the creditors of the company. A resolution authorizing holders of part-paid stock to surrender the same in exchange for full-paid stock is binding on the company, whether done in good faith or not. But if fraudulent, such surrender may be attacked collaterally by a party injured. A receiver cannot impeach such surrenders of stock as fraudulent. The creditors must assert their rights by their own action.

In Re Duckworth, L. R., 2 Ch., 578; Waterhouse vs. Jamison, L. R., 2 Chapp., 87; Litchfield's Case, L. R., 1 Eq., 231.

*Republic Life Ins. Co. vs. Swigert.*

Rep'd Jour'l, p. 745.

ILL. S. C.

## INSURABLE INTEREST.

§ 163. FIRE.—*Of Insolvent's Assignee.—Denial of Liability a Waiver of Proofs.*—The assignee of an insolvent in Michigan has an insurable interest and may insure as assignee before having filed the required bond.

Fuller vs. Hasbrouck, 46 Mich., 78 ; Coots vs. Radford, 47 Mich., 37.

The fact that the property was already insured by the assignor, and such policies came to him as assignee, will not defeat recovery. Where the company repudiated all liability, recovery will not be limited to the amount shown in the proofs of loss where such amount is less than the sum found due by the court.

*Sibley vs. Prescott Ins. Co.*

Rep'd Jour'l, p. 770.

MICH. S. C.

## PREMIUM NOTE.

§ 164. LIFE.—*Non-payment of Interest will not Work Forfeiture in Case of Commuted Policy.*—The policy was described in the margin of that instrument as non-forfeiture endowment, ten annual premiums, payable \$42.82 note, \$64.22 cash, each twelve months. It stipulated that if the insured failed to pay the premiums when due and the interest annually in advance on any outstanding notes, or should not pay any such notes at maturity, the policy should cease and determine, and the company should "not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided;" that if after the receipt of two or more annual premiums, default should be made in the payment of any subsequent premium, the policy should be converted into a proportional paid-up policy, provided it should be transmitted to the company and application made within one year from date. Default was made and an application sent agreeing to quit-claim to the company all claims except for the proportional amount, and to pay the interest in advance on outstanding notes. Thereupon the company indorsed upon the policy a recognition that it was binding for the pro-

portional amount, subject to the terms and conditions in the policy and quit-claim. *Held*, That the failure to pay interest subsequent to the commutation, and after the expiration of ten years, did not work a forfeiture.

*Cowles vs. Continental Life Ins. Co.*

*Rep'd Jour'l*, p. 764.

N. H. S. C.

### PREMIUM NOTE.

§ 165. *LIFE.—Given for Unauthorized Insurance is Void.*—Where a policy was issued by an unauthorized company, and the agent accepted a promissory note for the premium, the acceptance of the note was doing business within the meaning of a statute prohibiting a company from doing business without compliance with the laws, and such note is void in the hands of a third party to whom it was transferred by the company after it was due.

Citing and discussing *Hyde vs. Goodnow*, 3 Comstock, 170. It was therefore a contract of insurance, made and executed in Kansas: *Lamb vs. Bowers*, 7 Bissell's R., 373; *idem*, 315; *Western vs. Seneca M. Ins. Co.*, 12 N. Y., 261; *Taylor vs. Merchants' F. Ins. Co.*, 9 How., 400; *Goddard vs. Chaffee*, 2 Allen, 395; *Martin vs. State*, 59 Ala., 36; *Frousch vs. Decker*, 51 Wis., 46; *Towle vs. Larabee*, 26 Me., 446; *Lovejoy vs. Whipple*, 18 Vt., 376; *Bloom vs. Richards*, 2 Ohio, 388; *Smith vs. International Life Ins. Co.*, 35 How., 128; *Cin. Mut. H. A. Co. vs. Rosenthal*, 55 Ill., 91; *Bank of British Columbia vs. Page*, 6 Or., 435; *In Re Comstock*, 3 Saw., 218.

*Beneo et al. vs. Yesler.*

—1 155.

### RAILROAD.

§ 166. *FIRE.—Liability for Fires Through Negligence.—Right of Subrogation by Insurers no Defense.*—Where suit is brought against a railroad for a loss occurring through its negligence in not maintaining suitable spark-arresters on its engines, etc., the fact that the loss has already been fully paid by in-ur-

ance companies, whereby the latter secured the right of subrogation, is no defense. A loss-claimant may recover of a wrong-doer for a loss occasioned by the latter irrespective of any insurance unless such insurance was procured by the wrong-doer for his own benefit.

Weber vs. Morris & Essex R. R. Co., 35 N. J. (Law), 409; Clark vs. Wilson, 108 Mass., 219; Hayward vs. Cain, 105 Mass., 213; Perrott vs. Shearer, 17 Mich., 47; Merrick vs. Brainard, 38 Barb., 589; Peoria M. & F. Insurance Co. vs. Frost, 37 Ill., 333; Conn. Life Insurance Co. vs. New York, etc. R. W. Co., 25 Conn., 265; Rockingham Mut. Fire Ins. Co. vs. Barker, 39 Maine, 258; Carpenter vs. Eastern Trans. Co., 71 N. Y., 574; R. W. Co. vs. Dickerson, 59 Ind., 317.

*Cunningham vs. Evansville & Terre Haute R. R. Co.*

Rep'd Jour'l, p. 752.

IND. S. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

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*From certified transcripts in our possession.*

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## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

NOVEMBER TERM, 1884.

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FRANK T. MOONEY

vs.

HOWARD INS. CO.\*

A junk dealer was insured "on his stock of rags, old metals, bones, and barrels."

*Held*, That he might prove by a general usage of the trade that the terms included other articles than those specified, and a jury might infer from such usage, if of long continuance, that the insurers knew the technical meaning of the terms.

MORTON, C. J.

The defendant insured the plaintiff, "on his stock of rags, old metals, bones, and barrels," contained in his storehouse. The plaintiff is a junk dealer, "his stock" consisting of old articles and materials, paper stock, pieces and fragments of all kinds, and it could not be particularly described in a policy or other contract without great prolixity. We think it was competent for the

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\* Decision rendered, January 14, 1885.



plaintiff to prove that by a usage of the trade, the terms "rags" and "old metals" had acquired a broader signification than belongs to these words as commonly used. It was an application of the rule that, when words have two meanings, one common, and the other peculiar and technical, it is competent to show that they were used in the latter sense: 1 Greenl., Ev., § 295; *Macy vs. Whaling Ins. Co.*, 9 Met., 354; *Daniels vs. Hudson River Ins. Co.*, 12 Cush., 416, and cases cited.

The usage upon which the plaintiff relied was not a particular or a local usage, but was a general usage of the trade. The defendant asked the court to rule, "that a usage or custom of a particular trade, in order to bind the defendant, must be proved by substantive evidence to have been known to it or its agent; and that it was not enough that the jury should presume such knowledge if they found such a usage to have been of long continuance." The court refused this ruling, and instructed the jury "that the plaintiff must prove that the alleged usage was known to the defendant, and that they would be warranted in finding that it was known to the defendant, if they found upon all the evidence that there was such a usage or custom, and that it was well defined, universal, uniform, and of long continuance." We understand this to mean that the jury might infer the knowledge of the defendant from the universality and long existence of the usage. A usage such as the instructions required having been proved, the defendant's contract is deemed to have been entered into with reference to such usage, if known to it.

Underwriters insuring by certain words may fairly be presumed to know the mercantile meaning of those words, and the fact of a widespread and established use has, at least, a tendency to show that they had such knowledge: *Howard vs. Great Western Ins. Co.*, 109 Mass., 384; *Croncher vs. Wilder*, 98 Mass., 322; *Astor vs. Union Ins. Co.*, 7 Cowen, 202.

We are of opinion that the instructions given at the trial were sufficiently favorable to the defendant.

Exceptions overruled.

## UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

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*Motion to Set Aside the Verdict and Judgment.*

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KEHLER

vs.

NEW ORLEANS INS. CO.\* )

Where a policy of insurance procured through a broker contained the following conditions, viz.: "If any broker or other person than the assured have procured the policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect;" Held, that notice from the company to the broker who procured the policy, of an election to terminate the insurance, was not notice to the assured.

A verdict and judgment thereon will not be set aside upon the ground that the defendant has been prevented, by a mistake, and without fault, from being represented at the trial and making his defense, when the defense which he sets up in affidavits in support of his motion to set aside is entirely new, and not disclosed by the original pleadings.

Suit upon a fire insurance policy taken out by the assured through a broker. The policy contained among its conditions the following :

"If any broker or other person than the assured have procured this policy, or any renewal thereof, or any indorsement thereon, he shall be deemed to be the agent of the assured, and not of this company, in any transaction relating to the insurance. This insurance may be terminated at any time by request of the assured, or by the company, on giving notice to that effect."

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\* Decision rendered, April 11, 1885. From *Federal Reporter*.

The answer contains a general denial, and states that the defendant had terminated the insurance by notice to the plaintiff according to the terms of the policy, before any loss occurred. At the trial it appeared that the defendant had attempted to terminate the insurance before the fire, by giving notice to the broker who procured the policy, but that the plaintiff had received no actual notice of the defendant's desire to terminate the insurance until after the fire occurred.

The defendant was not represented at the trial. The verdict was for the plaintiff. The defendant moved to set aside the verdict, and filed affidavits tending to show that the attorney's absence had been caused by a mistake, and that it had a defense not set up in its answer.

G. M. STEWART, *for Plaintiff*.

ELENEIOUS SMITH and E. H. GARY, *for Defendant*.

TREAT, J. (orally).

In the case of *Kehler vs. New Orleans Ins. Co.* there is a motion to set aside verdict and judgment. The original defense to the case was that, under the terms of the policy, it could be canceled on notice given, and that said notice was given before the loss. On the testimony submitted, it appeared the notice was not given. I supposed the contention would be that the broker who negotiated the insurance must be treated as if he were the plaintiff himself, or his agent for receiving notice. He is not so. That question was before the supreme court and decided in the case of *Grace vs. Insurance Co.*, 109 U. S., 278 ; s. c., 3 Sup. Ct. Rep., 207. His functions terminated when he effected the policy.

Now, this motion goes a step further. It sets up in the affidavit an entirely new defense, which, it seems, was not thought of before, to wit, that the policy executed and delivered to the plaintiff was only on condition that the parent company should assent thereto,—which it never did. That is something that was not in the original pleadings. The party had abundant opportunity to do that originally. Now he wishes to set up a new defense, and re-open the case upon a theory which is utterly inconsistent with his own correspondence on file.

The motion will be overruled.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Common Pleas of York County.*

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WEGMAN

vs.

SMITH.\*

When a husband, who is named as beneficiary upon a policy of insurance on his wife's life, assigns the same to a purchaser for a speculative purpose only, and such assignee receives the amount of the policy upon the death of the insured, the husband is entitled to recover from him such amount less the sum paid by him for assessments and annual dues on the policy.

Assumpsit, by John Smith against Henry Wegman to recover the amount of a policy of insurance on the life of the plaintiff's wife received by the defendant.

GIBSON, J.

In May 1879, John Smith and Elizabeth Smith, his wife, made application to the York County Mutual Aid Association for a certificate of membership or policy of insurance on the life of said Elizabeth Smith, in the sum of \$700, payable to said John Smith. On May 10th, 1879, said policy was issued, and was immediately assigned by said Smith to one Martin Smyser, who paid therefor the sum of \$5, which was received either by Smith or his wife. Subsequently Smyser assigned the policy to Henry Wegman, the defendant. Smyser and Wegman paid all the assessments, dues, and fees on the policy. They had no insurable interest of themselves in the life of the insured. Upon the death of the insured the amount of the

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\* Decision rendered, June 2, 1884

policy was paid by the company to Wegman. Smith thereupon brought this suit.

Plaintiff requested the court to charge, inter alia, as follows :—

“That upon all the evidence given in this case the verdict of the jury must be for the plaintiff for the sum of seven hundred dollars, with interest from February 11th, 1881, less the amount paid by the defendant for assessments and annual dues.”

Affirmed.

Verdict and judgment for the plaintiff, whereupon the defendant took this writ, assigning for error, inter alia, the affirmance of plaintiff's point as above.

E. W. SPANGLER and W. C. CHAPMAN (with whom was H. W. McCALL), *for Plaintiff in Error*.

W. F. BAY STEWART (with whom was JOHN BLACKFORD), *for Defendant in Error*.

#### THE COURT.

The defendant in error was the husband of the person insured. He had such an interest in his wife as to make the insurance valid. The plaintiff in error occupied a different relation. He had no such interest in the person insured. He was in law a purchaser of the policy for speculative purposes. That fact may have been of no importance to the insurance company, but it is not a party to this issue. The contention is between other parties. The learned judge correctly held the assignee was entitled only the sum paid by him for assessments and annual dues.

Judgment affirmed.

## SUPREME COURT OF OREGON

BENEO ET AL. )  
                  us. )  
YESLER ET AL.\* )

The acceptance of an application by the agent of a foreign company, who was authorized only to receive premiums and forward applications is not making a contract of insurance. The contract is not consummated until the application has been accepted by the company and the policy issued, and the place of acceptance is the locus contractus.

Where such policy was issued by an unauthorized company, and the agent accepted a promissory note for the premium, the acceptance of the note was doing business within the meaning of a statute prohibiting a company from doing business without compliance with the laws, and such note is void in the hands of a third party to whom it was transferred by the company after it was due.

LORD, J.

This was an action upon a promissory note made at Seattle, Washington Territory, to one A. B. Covalt, and assigned after due to the plaintiffs.

The defense set up is, that the note was made in payment of a premium on a life insurance, held by the defendant Yesler, in a Kansas life insurance company; that the company had an agent at Seattle, Washington Territory, who solicited the insurance in January, 1876, and the note in question was given in August, 1876, at Seattle, in payment of the second semi-annual premium on the policy, and that the note was void for the reason that the said insurance company was a foreign insurance company, and had not complied with the laws of Washington Territory, in regard to foreign insurance companies doing business in the Territory.

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\* Opinion filed, February 17, 1885.

It appears by the bill of exceptions that the said Covalt, mentioned in the note, and one Guion, were agents of Alliance Mutual Life Assurance Society, a corporation organized and existing under the laws of the State of Kansas, and were engaged in soliciting life insurance for said company at Seattle, Washington Territory, and in making and taking applications therefor, and in collecting and receipting for premiums thereon. That in January, 1876, at Seattle, in said Territory, the said Guion, as agent of said company, received the application of the defendant Yesler, together with six hundred and seventy-one dollars, the amount of the first premium, for which he gave the said Yesler a receipt, and then turned over said application and the money so received to the said Covalt, as agent of the said company, who forwarded the same to Leavenworth, Kansas, for examination and acceptance by the company. That the said company accepted the same and thereupon issued a policy which was sent by mail, whether to the defendant Yesler or to their agent Covalt to deliver to Yesler, the evidence is conflicting. That when the second semi-annual premium of six hundred and seventy-one dollars, became due and payable on the said policy in August, 1876, the said Covalt called upon the said Yesler for the payment of said premium, who, not having the requisite funds on hand at that time to pay the same, thereupon executed and delivered to the said Covalt the promissory note in question. That the said note was sent to the company, and retained by them until it became due and payable, and then forwarded to Seattle for collection, and upon default of payment being made, the company charged the amount of the same to the account of the said Covalt.

Upon this state of facts, the court below instructed the jury that the taking of this note was doing insurance business within the Territory, and the result was a verdict and judgment for the defendant.

The contention of the plaintiff is that the taking of a promissory note in payment of a premium on an insurance policy, is not "doing insurance business."

Upon the facts as presented by this record, it would seem that the agent was not authorized to make a binding contract of insurance. As between him and the company, he was empowered to solicit and receive applications for insurance and receipt for the premium money therefor, and to forward them to the company for their approval or rejection.

In *Armstrong vs. State Insurance Company*, 59 Iowa, 215, it was held that the agent of an insurance company, who was authorized to

take applications for insurance and receive and receipt for premiums, and forward applications and premiums, and receive from the company policies of insurance when issued and deliver them to the assured, that such agent had no powers or authority to bind the company by a contract of insurance: *Dickenson County vs. Miss. Valley Ins. Co.*, 41 Iowa, 286; *Critchell vs. American Ins. Co.*, 69 Iowa, 404, 176; *Reynolds vs. Continental Ins. Co.*, 36 Mich., 121; *Morse vs. St. Paul F. etc.*, 21 Minn., 407.

When the defendant Yesler presented and delivered his application and the premium money therefor to the agent, to be by him forwarded to the company for its acceptance or rejection, he knew and understood no policy of insurance would be issued unless the company accepted his application. Nor was any contract consummated until the application was accepted and the policy duly issued.

The final act which made the transaction a binding contract upon the parties, was the acceptance of the application. Until this took place it was a mere proposition tendered, to be accepted or rejected. The contract was consummated when the company acted upon the proposal, and issued the policy, for then the minds of the parties had met and agreed.

"What was before," says Harris, J., "a mere proposition, then became invested with the attributes of a contract, and from that time each party became bound for its performance. If this be so, the contracts are to be regarded as having been made when the company received and accepted the defendant's application, and issued and transmitted to him their policies:" *Hyde vs. Goodnow*, 3 Comstock, 170. It was therefore a contract of insurance, made and executed in Kansas: *Lamb vs. Bowers*, 7 Bissell's R., 373; *idem*, 315; *Western vs. Seneca M. Ins. Co.*, 12 N. Y., 261; *Taylor vs. Merchants' F. Ins. Co.*, 9 How., 400.

Thus far the case stands clear. When the second annual premium came due on the policy of insurance, the agent called upon the defendant Yesler for its payment, and in lieu thereof, and under the circumstances already indicated, accepted the note in question, and the inquiry now arises, whether the taking of the note was doing business in the Territory. To undertake to give an exact definition to the word business, which could be applied as a test or criterion in every case, would be an impossible task. It is said to be a word of large signification, and to denote the employment or occupation in which a person is engaged to procure a living: *Goddard vs. Chaffee*, 2 Allen, 395; *Martin vs. State*, 59 Ala., 36.



Under a statute that any person who shall do any manner of labor, business, etc., shall be punished, etc., the loaning of money and taking a note therefor, was held to be business within the meaning of such statute: *Froush vs. Decker*, 51 Wis., 46. In *Towle vs. Larabee*, 26 Maine, 446, it was held that a promissory note made on Sunday, for the price of a horse bought on that day, was void, as being in contravention of the statute prohibiting trade and business.

In *Lovejoy vs. Whipple*, 18 Vt., 376, the taking of a promissory note executed upon Sunday, in consummation of a contract previously made, was considered business.

"It thus seems," as said by Thurman, S., "to be the common expression of the courts that the making of a contract is business within the meaning of these acts:" *Bloom vs. Richards*, 2 Ohio St., 388.

It is the inhibition against doing business on this particular day against which these statutes are directed. It is not that the consideration is illegal, or void as against public policy, but it is the doing of a thing—the making of a contract—on a day when it is prohibited and unlawful, that vitiates the transaction, and renders it void. The taking of a note for a loan or debt, or other consideration, is the making of a contract, and is a transaction which signifies business in the sense of these statutes. The transaction is, in fact, the doing of business, which, being prohibited on that particular day, is void.

The company was prohibited from doing business in the Territory, without compliance with its laws. This it had not done. It had effected an insurance, issued its policy, and the semi-annual premium was due. Was the taking of the note in question, by the agent, in payment of this premium, the doing business in the Territory? Was it a transaction which signifies the doing of business? Tested by the judicial interpretation applied to these statutes, the taking of the note was the making of a contract which signifies the doing of business, and is within the prohibition of the law.

In *Smith vs. International Life Insurance Co.*, 35 How., 128, the court held that the acceptance of yearly premiums upon outstanding policies, and of paying the losses therein which may accrue, was doing business within the meaning of an act taxing all persons who are not residents, doing business in the State. The issuing of policies, taking of premium notes, collecting or receiving cash premiums, and adjusting and paying losses, constitute the principal business of insurance companies: *Lamb vs. Lamb*, 4 Bissell, 425. Any or all of these acts, when they involve the making of a contract, imports, at least,

the doing of business, and if done within the Territory without compliance with its laws, is void. The taking of a note for premium money, is as much the making of a contract as was the insurance policy. As such, either or both would denote a transaction, which signifies business; and, if done, when or where prohibited, would not constitute valid contracts. It is not material that the note was made payable to the agent. The consideration was for premium money due the company, and it was taken by the agent in his capacity as such, for the benefit of the company. It was as agent for the company, and in its interests and for its benefit, that he transacted the business. He had no other or personal business or dealings with the defendant Yesler. In the person of its agent, it was constructively present, making a contract or doing business in violation of the laws of the Territory. This it could not do. To enforce, therefore, the payment of this note, would be virtually to disregard the plain provision of the law, enacted to subserve wise and salutary purposes: *Bliss on Life Ins.*, sec. 145.

"When the legislature prohibits an act," says Mr. Justice Walker, "or declares that it shall be unlawful to perform it, every rule of interpretation must say that the legislature intended to interpose its power to prevent the act, and, as one of the means of prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise, would be to give to the person or corporation, or individual, the same right in enforcing prohibited contracts, as the good citizen who respects and conforms to the law. To permit such contracts to be enforced, if not offering a premium to violate a law, it certainly withdraws a large portion of the fear that deters men from defying the law. To do so, places the person who violates the law on an equal footing with those who strictly observe its requirements:" *Cin. Mut. H. A. Co. vs. Rosenthal*, 55 Ill., 91; *Bank of British Columbia vs. Page*, 6 Or., 435; *In Re Comstock*, 3 Saw., 218.

As the note was transferred after it was due, it was open to the defense alleged, which, in our judgment, is well sustained. There was no error, and the judgment must be affirmed.

THAYER, J., dissenting.

When this case was argued, I was very much inclined to the opinion that soliciting and receiving applications for insurance in Washington Territory by an agent of a foreign insurance company,

and forwarding them from there to the company, although the agent had no authority beyond the right to forward such applications to be examined and passed upon at the home office, would constitute the doing an insurance business, within said Territory, and be in violation of its statutes, unless complied with by the company, but the authorities collected by his honor, Judge Lord, and referred to in the opinion prepared by him in this case, have changed my preconceived notions upon the subject, and I concur in that opinion to the extent that the insurance upon the life of said H. L. Yesler by the Alliance Mutual Life Assurance Society was, as a matter of law, effected at the home office of said company in the State of Kansas, notwithstanding the application therefor was solicited by the agent Covalt in Washington Territory, was made there, and forwarded by said agent from there. But, I am not able to concur in the opinion that the taking the note sued on, for a premium, when the insurance was lawfully effected, was doing business within the meaning of the law, in Washington Territory; nor, under the circumstances suggested, do I believe that the legislature of that Territory intended, or could rightfully pass a statute that would render such an act unlawful. If the insurance was lawful, and the premium notes executed by Yesler were valid, I am unable to understand why the company had not the right to collect them, or to adjust the claim by taking Yesler's note with an indorser in payment thereof.

If Yesler had been residing in Kansas when the insurance was effected upon his life, and had personally made the application therefor at the home office of the company; had executed the premium notes there, received the policy there, and then emigrated from that State to Washington Territory, it could not be doubted but that the company, as a matter of course, would have had the right to forward those notes and collect them of him at their maturity. And the right of the company stands upon the same footing in this case, as it would have stood in the case supposed, and it would no more be doing business, within the meaning of the laws of Washington Territory, in the one case than the other.

Yesler owed the company a lawful debt, and how could a Territory or State law be construed consistently so as to prevent its collection? If Yesler had been in possession of the tangible property of the company, and it had attempted to recover it from him in Washington Territory, would not that have been doing business there just as much as its attempt to recover from him its chose in action would have been? In either case it would have been an effort to obtain

from him that which belonged to it legally, and I do not see how such an endeavor could be adjudged a violation of law.

The Washington Territory law certainly only intends that a foreign life insurance company shall not, except under the conditions it imposes, do its insurance business there. It would to my mind, be unreasonable to suppose that any company of that character could not enforce a payment of lawful obligations due to it without any compliance with such conditions, and an action instituted in its courts would be doing business as much as receiving a promissory note from a debtor.

If an officer, intrusted with the funds of the Alliance Company, at its home office in Kansas City, should run off with them, in violation of his trust to Washington Territory, could not the company cause his arrest upon civil process, or receive indemnity for the injury, without filing in the office of the secretary of that Territory a copy of its articles of incorporation, and appointing an agent as provided in said laws, and would such an attempt to arrest the defaulter, or to obtain satisfaction without suit, be "commencing to transact business in the Territory," within the meaning of said laws? Such a requirement, imposed as a condition for doing such an act, would be strange comity. I fear that such a construction of the statutes of our neighboring Territory would do injustice to the courtesy of its citizens. The language of the statute is, "that all corporations, now existing, or hereafter formed, under the laws of the States, etc., shall have full power and authority to sue and be sued, hold, purchase and acquire, sell, lease, and dispose of real and personal property, and generally to do and perform any and every act, and transact business within the (this) Territory, in the same manner and to the same extent as though said corporation had been organized under the laws of the (this) Territory : *Provided*, that any such corporation hereafter acquiring property, or commencing to transact business in the Territory, shall first comply with the provisions of section 2 of this act."

The proviso, it will be seen, only extends to "acquiring property," and "commencing to transact business." Taking the note was not "acquiring property," as it was but a novation of a debt; nor was it the "commencing to transact business," within the meaning of the statute.

If the act had provided that no foreign lawyer should practice his profession in that Territory, without having first been admitted to its courts, it would not extend to the collection of a fee there, earned

somewhere else, or that no foreign merchant should carry on business there without a license, surely a merchant at Portland could sell a bill of goods to a Washington Territory citizen at Portland, and send over his claim for collection, without such a license. The Territorial statute may be a wholesome provision at law, but I am at a loss to understand why it should have such a latitudinarian construction as is attempted to be given it. The construction, doubtless, will operate as a great favor to Yesler. He owed a premium note. It was a legal claim against him; he took it up by giving the note in suit, and, although that has been put in circulation and credit given it, yet, upon what appears to me to be a very flimsy reason, is enabled to repudiate it. Yesler received the full benefit of the notes; the consideration was valid. Hackney & Beneo have, doubtlessly, parted with goods upon the faith of it, but the former says that his payment and discharge of his legal obligation, was, under the laws of Washington Territory, an illegal act, and he is relieved from his liability.

In my opinion, if such a law existed, it would be "more honored in its breach than in its observance." I am in favor of a reversal of the judgment.

SUPREME COURT OF ILLINOIS.

*Error to Cook County.*

REPUBLIC LIFE INS. CO.

vs.

CHARLES P. SWIGERT, AUDITOR ETC., ET AL.\*

The law of Illinois authorizing the appointment of a receiver by the court in case of the insolvency of a life company is constitutional, and where the petition sufficiently sets forth the necessity, an injunction may issue against further business and a receiver be appointed before final hearing.

A corporation may in good faith, purchase and sell shares of its own stock. But fraud would vitiate the sale.

A stockholder selling his stock to the corporation will be protected against further payment of his subscription unless impeached for fraud on the creditors of the company.

A resolution authorizing holders of part-paid stock to surrender the same in exchange for full-paid stock is binding on the company, whether done in good faith or not. But if fraudulent, such surrender may be attacked collaterally by a party injured.

A receiver cannot impeach such surrenders of stock as fraudulent. The creditors must assert their rights by their own action.

WALKER, J.

On the 25th of May, 1877, the State auditor filed his petition in the Circuit Court of Cook County against the Republic Life Insurance Company, under the statute, to wind up and settle its affairs. The petition alleged facts which under the statute entitled the auditor to the relief sought. On the same day the company entered its appearance, waived service, and filed an answer as follows: "Now comes the said defendant by its solicitor and saith that it cannot

\* Decision rendered, January 22, 1885.

deny the matters in said bill alleged, and it prays to be hence dismissed."

Thereupon, and on the same day, the solicitor of the auditor moved the court to appoint a receiver, as prayed for in the petition, and no objection being made, Samuel D. Ward was so appointed. It was also decreed that the company, its officers, agents, etc., be enjoined and restrained until the further order of the court from further proceeding with its business and from any transfer of the property other than to the receiver. And from receiving or paying out any moneys; and that neither the receiver nor defendant, its officers, agents, servants, or attorneys shall exact or take from its policy-holders any sum or sums of money to accrue from premiums on policies beyond what may be justly due or payable on or as of the 25th of May, 1877.

The decree also required the company to assign by deed all of its property, real, personal, and choses in action, to the receiver, which it did in conformity to the decree. The receiver thereupon took possession, proceeded to collect and reduce the choses in action and the property into money, and to pay the debts of the corporation, and to settle its affairs, under the orders of the court. He, for the purpose of paying the debts, applied to the court for and received permission to sue for and to recover balances unpaid by shareholders on their stock subscriptions, and brought suits for that purpose.

He also applied for, and authority was granted, to bring suits to impeach the surrender of partly paid stock and the exchange of paid-up shares of stock equal to the money paid on shares for which they had subscribed but not paid in full, because it was alleged the exchange and surrender of such shares was contrived to defraud creditors of the company, by thus terminating the liability the subscribers were under to pay the full amount for which they had subscribed, if necessary to discharge the debts owing by the company.

Afterwards, on the 22d of June, 1881, the case came on for a hearing, and the court rendered a final decree, overruling the prayer of the company in its answer to be dismissed out of court, and a further decree was rendered that the company be perpetually enjoined from the further prosecution of its business, and the decree ratified and confirmed the previous appointment of Ward as receiver, and from that decree the company appeals.

It is urged that the allegations of the bill filed by the auditor are not sufficient to sustain the decree and it is erroneous. That the law authorizing the appointment of a receiver and the dissolution and winding up of the company and its affairs is violative of the

contract clause of both the Federal and our State constitutions and the act is therefore void and the decree erroneous. It is also urged that even if the act is valid and the allegations of the bill are held sufficient, that the court had no power on the application of the receiver to require him to proceed to ascertain whether the surrender of subscriptions and the receipt of paid-up stock for the money paid on such subscriptions, was in good faith or a fraudulent device to enable the subscribers for stock to escape their liability to pay the remainder for the benefit of creditors, as that could be done alone on the application of creditors of the company.

The eighty-fourth section of chap. 73 of R. S. of 1874, provides: "That if the auditor of State upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public,  
\* \* \* \* he shall apply by petition to a judge of any circuit court of this State to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had or otherwise as the court may direct."

The further clause of this section provides that the court, "may in all such cases make such orders and decrees, from time to time as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify, or perpetuate such injunction, and make such orders and decrees as may be needful to suspend, restrain, or prohibit the further continuance of the business of the company."

The eighty-eighth section of the same act provides, in a case like the present as well as in others, that the receiver "Take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of State, and collect the debts due, and the property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and to do all other acts necessary to the closing of its concerns." These sections confer on the courts and receivers large and comprehensive powers. And the petition contains all the eighty-fourth section requires to enable the court to grant an injunction and to appoint a receiver. The allegations of the petition filed by the auditor conferred jurisdiction to render such a decree, especially so when the company answered that it could not deny the allegations of the petition.

We are relieved from the consideration of the constitutional ques-



tion, as that was fully considered in another branch of this case; see *Ward vs. Farwell*, 97 Ill., 593, where this law was held constitutional. Nor is it necessary to again state the reasons which led to that conclusion. No reason has been suggested that requires us to overrule or modify the judgment then announced, and we must adhere to it as conclusive.

A majority of the court in that case also held, that the receiver was properly appointed on the first application and before a final hearing. That a mere custodian to hold and preserve the property until a final decree should be rendered was not required, and we must hold that case conclusive of that question and precludes further discussion.

As to the first question we regard the law as settled in this court that a corporation may in good faith purchase and sell shares of its own stock. It was so held in *Chicago, Pekin & S. W. R. R. Co. vs. Marseilles*, 84 Ill., 145 and 643, and *Catlin vs. Republic Life Ins. Co.*, 86 Ill., 220. If the mere form of a purchase of such stock by the company was adopted as a cover for a fraud on creditors, the transaction would of course be void as fraud vitiates all contracts. But if such a purchase should be attacked as fraudulent it would devolve on the complainant to establish the fraud. And the stockholder who has sold stock to the company will be protected against further payment on his subscription unless it is impeached for fraud on the creditors of the company. It is urged that under the sixth section of the charter the receiver was not authorized to institute any proceedings in relation to the exchange of part-paid for full-paid stock. That section is this: "The real and personal property of each individual stockholder shall be held liable for any and all liabilities of the company, to the amount of stock held or subscribed by him, and not actually paid in. In all cases of losses exceeding the means of the corporation, each stockholder shall be liable to the amount of unpaid stock."

It is claimed that the liability is primarily to the corporation and that it may enforce it or that it may purchase and hold or cancel such shares. That when so purchased, the liability of the shareholders is ended, and cannot be revived. If, however, he had subscribed for shares and has not paid in full for them, he is liable for the unpaid portion and for such unpaid balance the company could have sued and recovered. And the receiver succeeded to the same right, but to nothing more. When collected, the fund would be in his hands subject to distribution by the court.

That the resolution authorizing holders of partly paid shares to surrender them and receive paid-up shares to the amount paid thereon, was within the power of the company, has been decided, as we have seen, by this court. And this being so, the surrender of partly paid for full-paid stock to that extent is binding on the company whether done in good or bad faith. A corporation acting within the scope of its powers is like a natural person bound by its acts, although performed for fraudulent purposes. It cannot be heard to allege that it was fraudulent and have it set aside. A party cannot escape the effects of a fraud he has perpetrated, but such frauds may be attacked collaterally by any person who is or will be injured by the fraud. Nor would a fraudulent transaction of this character form an exception to the rule. Fraud vitiates all contracts as to third persons injured thereby. If this was a fraudulent scheme to prevent creditors of the company from collecting their debts, the law is not so defective as not to afford them a remedy.

But the question is whether, even if it be conceded that this was a fraudulent contrivance, the receiver has, or the court can confer upon him, the power to uncover the transaction and compel such stockholders to contribute to the extent, if necessary, of their unpaid subscriptions, for the payment of the debts of the company as though they had not surrendered the unpaid stock to the company; or whether the creditors alone can sue.

It is earnestly insisted that the receiver under the statute or the order of the court can perform no such duty. That he may possess himself of and sell the property of the company, and collect, by suit or otherwise, all debts, claims, or demands for which the company could have sued and recovered. And when received pay it out under the order of the court. That this is the extent of his power. Bispham in his work on Equity, sec. 579, says, the effect of the appointment of a receiver is to remove the parties to the suit from the possession of the property; but at the same time the right to the property is in no way affected, and the receiver only holds the property for the benefit of him who may ultimately be entitled to it. In section 580 he says, a receiver is, as a general rule, a mere custodian, and has no powers except those expressly conferred by the order of his appointment or by special directions of the court given from time to time. His general duty is to take possession of the estate; and under the supervision of the court to so manage it as to preserve it from loss or waste. That the powers of a receiver are limited, and he must constantly apply to the court for advice

and sanction. This statement of the law would have been more accurate had he added that the receiver might also exercise all powers conferred by statute as his powers and duties may all be prescribed by statute. It is thus seen from this authority he is unable to act beyond reducing the property to possession, receiving the money due the owner, and safely holding it subject to the order of the court unless empowered by special directions of the court.

The court is of course limited in its power to give directions to the receiver. Its power is not unlimited or unrestrained, although possessed of a large discretion. Whilst the court may direct and the statute authorize the receiver to sue for and collect debts due the owner and to maintain actions to recover property, run against the owner refusing to surrender it, but we find no case that holds that he may sue or the court may empower him to sue, to set aside contracts made by the owner, on the grounds they were entered into for the purpose of defrauding creditors.

In the case of *In Re Duckworth*, L. R. 2 Ch., 578, it was said:—

“The liquidator represents the creditors only because he represents the company, and through the company the rights of the creditors are to be enforced.” In the case of *Waterhouse vs. Jamison*, L. R. 2 Chapp, 37, it was held the liquidator had no power to show that the certificate of organization was false in the statement that the shareholders had paid for their stock and proceed against them for unpaid stock. That the liquidator could only recover what the company might had the receiver not been appointed, and what was to be received from the shareholders must be enforced in that right; that what was due to the company is that only which is recoverable by the company. That the liquidator stood in the place of the company. It was held he could not impeach the certificate and recover, because the company had no such power. It was said that parliament could have conferred such power on the liquidator, but had not conferred it.

In *Litchfields’ case*, L. R. 1. Eq., 231, Claypole conveyed a patent right to the company and received shares of paid-up stock therefor. No money was paid. A portion of these shares was afterwards transferred to *Litchfield*. It was contended that the transaction was a fraud on creditors, and the liquidator applied to have *Litchfield’s* name placed on the list of shareholders who had not paid in full. It was held that creditors had only the right to get their debts from shareholders liable to contribute to the payment, to which holders of paid-up shares were not liable to contribute. It was said that

whether the creditors could obtain relief it was necessary to decide.

It is true these cases were under a statute, but they were proceedings in chancery. Had there been such equity power of the court independent of the statute, it would have doubtless been invoked. But the fact that it was not, renders it clear that the different chancellors engaged in their decision, supposed there was no such power and it could not be exercised unless empowered by statute. We are from these considerations of the opinion, that under the ordinary chancery powers of the court there was no authority to direct the receiver to file a bill to impeach the transactions of surrendering unpaid stock and receiving paid-up stock, on the grounds that it was a fraud on creditors. Nor has the statute conferred any such power.

If the creditors have sustained injury by those transactions because they are fraudulent, they must assert their rights by their own action and by appropriate proceedings.

The decree of the appellate court is reversed so far as it affirms the decree of the circuit court licensing the receiver to sue, to set aside the transaction by which unpaid stock was surrendered and paid-up stock was issued to the amount paid on unpaid stock, as a fraud on creditors of the company, and the decree is in all other things affirmed, and the case is remanded that such a modification may be made.

Decree modified.

MULKEY, J., dissents.

## SUPREME COURT OF INDIANA.

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*Appeal from the Knox Circuit Court.*

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JAMES H. CUNNINGHAM ET AL.

vs.

EVANSVILLE &amp; TERRE HAUTE R. R. CO.\* }

Where suit is brought against a railroad for a loss occurring through its negligence in maintaining suitable spark-arresters on its engines, etc., the fact that the loss has already been fully paid by insurance companies, whereby the latter secured the right of subrogation, is no defense.

A loss-claimant may recover of a wrong-doer for a loss occasioned by the latter irrespective of any insurance, unless such insurance was procured by the wrong-doer for his own benefit.

DEWOLF and CHAMBERS, *for Appellant.*IGLEHART, WILLIAMS, VIEHE & EVANS, *for Appellee.*

Howe, J.

This is a suit by the appellants, James H. and James A. Cunningham, as plaintiffs, against the appellee, the Evansville and Terre Haute Railroad Company, as sole defendant. The object of the suit was to recover damages for the destruction of the appellant's starch and glucose works by fire, communicated thereto, as alleged, by and through the negligence of the appellee, and without any contributory negligence on the part of the appellants. The complaint of the appellants was in three paragraphs. In the first paragraph, appellants alleged that the appellee negligently failed to keep its engines, used on its railroad track adjacent to their works,

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\* Decision rendered, June 25, 1885.

supplied with suitable spark-arresters, but suffered them to become old, worn out and in bad repair, so that coals of fire escaped from such engines and, without the appellants' fault, communicated to and destroyed their works.

In the second paragraph of their complaint, appellants alleged in substance that appellee negligently overloaded its train of cars, used on its railroad track adjacent to the appellants' works, so that the engines hauling such trains emitted sparks and coal of fire, which, without appellants' contributory fault, communicated fire to their works, and they were thereby consumed and destroyed.

In the third paragraph of their complaint, appellants alleged in brief that, by the general negligence of the appellee in the construction, management, and use of its engines and trains of cars, sparks and coals of fire were suffered by appellee to escape from its locomotives, whereby appellants' starch and glucose works, without their fault, were set on fire and were burned and destroyed. A schedule of appellants' property, so burned and destroyed, is set out in each of the paragraphs of complaint.

The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, the defendant below. Over the appellants' motion for a new trial, it was adjudged by the court that appellants take nothing by their suit, and that appellee recover its costs.

The first error of which appellants complain here is the overruling of their demurrer to the second, third, and fourth paragraphs of appellee's answer.

The answer was in five paragraphs, of which the first was a general denial of the complaint. The basis of each, the second, third, fourth, and fifth paragraphs of answer is substantially the same, namely: That the appellants' starch and glucose works were insured against loss or destruction by fire, at the time they were burned, in divers named fire insurance companies, in the aggregate amount of fifty thousand dollars, and that after their works had been so burned and destroyed, upon proofs of their loss and an adjustment thereof, the appellants had actually received from such insurance companies the aggregate sum of \$35,224.09. Upon this basis of facts, the appellee alleged in the second paragraph of its answer, that the insurance money so received by the appellants was more than the value of the property so burned and destroyed, and more than the loss and damage sustained by them, that, by means of such payment of such insurance money, the several insurance companies became and were

subrogated to all the rights of the appellants in and to the property so burned and destroyed, and to all their rights of action for the destruction of such property, and to all the pretended rights which the appellants were seeking to enforce in this action, and so the appellee said that appellants were not the real parties in interest.

Upon the same basis of facts, the appellee alleged in its third paragraph of answer that, after the burning and destruction of their starch and glucose works, the appellants and the several insurance companies mutually settled, appraised, and agreed upon the amount of such loss and damage complained of herein, at the sum of \$68,375.65, which was a sum greater than the damage suffered; that, thereupon, the several insurance companies paid, as and for the sum insured upon such property, the aggregate sum of \$35,224.09, whereby all rights of action as to such sum, became and were transferred to such insurance companies, and so the appellee said that, as to such sum, appellants could not maintain this action.

In its fourth paragraph of answer, upon the same basis of facts, the appellee alleged the appellants and the several insurance companies, after the burning and destruction of the starch and glucose works, agreed upon the value of such property and the amount of the loss, which latter was fixed at the highest limit and more than the same really was, to wit, at \$68,375.65, and that, upon such insurance and damage, the insurance companies paid the appellants the amount insured, to wit, \$35,224.09, whereby all right of action for the causes stated in the complaint herein became and were transferred to the several insurance companies, and appellants thereby became divested of all right of action, for the causes set forth in their complaint.

It will be observed that the appellee has not controverted in either of these paragraphs of answer, any of the facts stated by the appellants in either paragraph of their complaint, as constituting their cause of action. For the purposes of these paragraphs of answer, the appellee concedes that the appellants' property was, without any contributory fault on their part, burned and destroyed by and through the fault and negligence of the appellee, (1) in failing to supply its engines with suitable spark-arresters; (2) in so overloading its trains of cars, that the engines hauling the same emitted sparks and coals of fire, and (3) in the construction, management, and use of its engines and trains, so that sparks and coals of fire were suffered to escape from its locomotives. Making these concessions, the appellee claimed that appellants' action against it, for

the damages resulting from its negligent destruction of their property, (1) was wholly barred by reason of the fact that they had received from certain insurance companies in which they had insured such property against loss by fire, certain sums of money amounting in the aggregate to more than the value of their property so burned and destroyed, and to more than the loss or damage sustained by them, and (2) was barred in part as to the amount of the insurance money, so received by them for the burning and loss of such property from such insurance companies, which was slightly in excess of one-half of the appraised and agreed value of the entire property so burned and destroyed.

The paragraph of appellees answer, the substance of which we have given, proceeds upon the theory that although the appellants' property, without contributory fault on their part, was consumed and destroyed by and through the negligence of the appellee, they cannot recover the damages occasioned by such destruction of their property of or from the appellee, if it appears that they were indemnified for such damages by contracts of insurance against loss by fire, unless the amount of damages exceed such indemnity, and then only to the extent of such excess. In other words, the appellee claims in its answer that, to the extent the appellants were indemnified for their damages, resulting from the destruction of their property by fire, by their contracts of insurance against loss by fire, it, the appellee, is exempt from liability to them for such damages, although the destruction of their property by fire was caused by and through its negligence, without their contributory fault. These positions cannot be maintained. The contract of the appellants for the insurance of their property, with the insurance companies, and their subsequent conduct in relation thereto, are matters in which the appellee, as the wrong-doer, had no concern, and which do not affect the measure of its liability. So the law seems to be uniformly settled elsewhere, and we know of no sufficient reason for adopting a different rule of decision in this State. *Weber vs. Morris & Essex R. R. Co.*, 35 N. J. (Law), 409, *Clark vs. Wilson*, 103 Mass., 219; *Hayward vs. Cain*, 105 Mass., 213; *Perrott vs. Shearer*, 17 Mich., 47; *Merrick vs. Brainard*, 38 Barb., 589; *Peoria M. & F. Insurance Co. vs. Frost*, 37 Ill., 333; *Conn. Life Insurance Co. vs. New York etc. R. W. Co.*, 25 Conn., 265; *Rockingham Mut. Fire Ins. Co. vs. Barker*, 39 Maine, 253; *Carpenter vs. Eastern Trans. Co.*, 71 N. Y., 574.

The appellants claimed, that their property had been consumed



and destroyed by and through the actionable negligence of the appellee. In such a case they would be entitled to recover their entire loss from the appellee, and the fact that the insurance companies, in which their property was insured, had paid them the amount of such insurance, we think, did not constitute any defense whatever to the appellants' action. We are of opinion, therefore, that the trial court erred in overruling the appellants' demurrers to the second, third, and fourth paragraph of appellee's answer.

But it is claimed by appellee's counsel, that even if the rulings of the court, upon the demurrers to these paragraphs of its answer, were erroneous, we ought to hold upon the entire record, that such errors were harmless and worked no injury to the appellants. We do not think so. The error of the court in these rulings, runs through the record and, after the evidence is all in, is repeated in its instructions to the jury trying the cause. The jury were thus instructed by the court: "You will ascertain from the evidence the aggregate amount of the damage to the property, named in the complaint. If such amount does not exceed the sum paid by the insurance companies as above stated, you will return a verdict for defendant. If it does, you will ascertain the excess, and, having added six per cent interest on such excess from the date of the fire until now, return a verdict for the plaintiff for such excess and interest." This instruction, as we have seen, is not the law, but was a repetition to the jury of the error of the court, in its rulings upon the demurrers to the several paragraphs of appellee's answer. It will not do to say, we think, of such a continuing error running through the record, that it is a harmless error. At all events, common fairness seems to require that the appellants should, at least, have an opportunity to try their cause, freed from such entangling errors.

In speaking of the claim of the wrong-doer to the benefit of insurance money received by the injured party, a recent writer on the law of damages, says: "There can be no abatement of damages, on the principle of partial compensation received for the injury, where it comes from a collateral source, wholly independent of the defendant, and is as to him *res inter alios acta*. \* \* \* \* \* Nor will proof of money, paid to the injured party by an insurer or other third person, by reason of the loss or injury, be admissible to reduce damages, in favor of the party by whose fault such injury was done. The payment of such moneys, not being procured by the defendant, and they not having been either paid or received to sat-

isfy in whole or in part his liability, he can derive no advantage therefrom in mitigation of damages for which he is liable.

As has been said by another, to permit a reduction of damages, on such a ground, would be to allow the wrong-doer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." 1 Sutherland on Damages, p. 242.

The doctrine here declared was recognized, approved, and acted upon by this court, in *Sherlock vs. Alling*, 44 Ind., 184. In that case, a similar defense was interposed to that pleaded by the appellee in the second, third, and fourth paragraphs of its answer, in the case in hand. In considering this defense, the court there said: "It proposes to use, as a defense to damages resulting from the wrongful act of the defendants, by way of set-off, recoupment or in mitigation of such damages, pecuniary benefits received by the injured party, to which the defendants had not contributed and not resulting from, or connected with, the act causing the death-benefits, which, it is fair to presume, would have been realized at a future day, without the aid of their wrongful act." So, in *Ohio etc. R. W. Co. vs. Dickerson*, 59 Ind., 317, it was held by this court that the fact, that the salary of a person, injured through the negligence of the defendant, is paid by his employer during the time he is disabled by such injury, cannot mitigate the damages such injured party may recover, in an action therefor.

In their exhaustive brief of this cause, the appellants' learned counsel have ably discussed a number of alleged errors of law, occurring at the trial and duly excepted to. But as these errors may not occur again, upon a new trial of this cause, we need not and do not intend this opinion in the consideration and decision of the questions thereby presented.

The judgment is reversed with costs, and the cause is remanded with instructions to sustain the demurrers to the second, third, and fourth paragraphs of answer, etc.

Niblack, J., expressed no opinion in this case.

## SUPREME COURT OF CALIFORNIA.

SCHROEDER ET AL.

VS.

SCHWEITZER LLOYD.\*

A marine policy of insurance implies a warranty that the vessel shall not deviate from the voyage declared in the policy. Any voluntary deviation is a change of the risk, and forms a departure from the contract, the legal effect of which is to discharge the insurers from liability for any loss happening to the thing insured subsequent to the unauthorized deviation.

The defendant insured certain wheat on the steamer *Colorado*, for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong, and thence by the usual "connections" to Batavia; it was the usual practice for the company's steamer to carry its cargo to Hongkong without transshipment at Yokohama, or connecting for that purpose, with any other vessel, at the last named port; such usage was well known to the defendant when it issued the policy. *Held*, That a transshipment of the property insured at Yokohama was a deviation from the policy and released the insurer from liability thereunder for a loss subsequently incurred. This result follows, although the bill of lading, the form of which was well known to underwriters in San Francisco, provided that the carrier might transship at Yokohama, in the absence of proof that it had ever before made such transshipment.

A provision in a bill of lading reserving the right to the carrier to transship at an intermediate port, is not binding on the consignor, under section 2,176 of the civil code, unless he expressed his assent to it by signing the bill of lading.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

S. V. SMITH & SON, for the Appellant.

ANDROS & PAGE, for the Respondent.

\* Opinion filed, Jan. 10, 1885. From *W. C. Reporter*.

McKEE, J.

This is an action on a marine policy of insurance to recover damages for an absolute loss of three thousand nine hundred and fifty-one sacks of wheat shipped by the plaintiffs from San Francisco to Batavia.

By the terms of the policy, which was issued on the twelfth of August, 1874, the defendant insured, in the sum of sixteen thousand dollars, for and on account of whom it might concern, four thousand five hundred and fifty-one sacks of wheat laden, under deck, on board the Pacific Mail Steamship Company's steamer *Colorado*, then about to start for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong; and thence by the usual "connections" to Batavia.

The wheat was insured for the voyage, against "perils of the sea, fire, pirates, assailing thieves, jettisons, barratry of the master or mariners, unless the insured be owner or part owner of the vessel, and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said property, or interest to which insurers are liable by the rules and customs of insurance in San Francisco, embezzlement and illicit trade excepted in all cases."

On the voyages of the company's steamships between San Francisco and Hongkong, with cargo laden for Hongkong or Batavia, it was the usual practice, or course of business, for the company's steamer on which such cargo was laden at San Francisco, to carry the same to Hongkong without transshipping at Yokohama, or connecting for that purpose, with any other vessel or vessels, at the last-named port; that usage was well known to the defendant when it issued the policy of insurance, and it charged a lower rate of premium on the policy, because of its knowledge of the fact that there was to be no transshipment of the wheat at Yokohama.

With the wheat, thus insured, on board, the *Colorado* proceeded on her voyage from San Francisco to Hongkong, and in transitu, reached in safety the port of Yokohama; but on making that port the master received instructions from the company not to proceed to Hongkong, but to return with the *Colorado* to San Francisco. He, accordingly, without the knowledge or consent of the underwriters, or of the consignors, caused the wheat to be transshipped from the *Colorado* to two steamers belonging to the company, one of which was known as the *Sierra Nevada*, and the other as the *Costa Rica*, and returned with the *Colorado* from Yokohama to San Francisco. Six hundred sacks were transshipped on the *Sierra Nevada*, and three

thousand nine hundred and fifty-one sacks on the *Costa Rica*; the six hundred sacks were safely carried by the *Sierra Nevada*, and connecting steamers at Hongkong to Batavia, and the three thousand nine hundred and fifty-one sacks were carried by the *Costa Rica* to Hongkong, where the agents and servants of the company received them, and according to the established usage of the company, which was known to the defendants, stored them in a warehouse on the harbor front of Hongkong for reshipment, at the first opportunity, by connecting steamers to Batavia.

But while the wheat was thus warehoused, awaiting transportation to Batavia, the harbor of Hongkong was swept by a typhoon, which forced the waters of the harbor up on the land with such violence that they broke in the roof and windows of the warehouse and drowned the wheat, so that, when the water subsided, it immediately began to sprout and become swollen and heated, and, in that condition, it was impossible to reship it for transportation to Batavia.

As the law of these facts, we held, on a former appeal: 60 Cal., 467; that the underwriters were discharged from liability for the loss of the wheat, because of the unauthorized deviation from the voyage which had been insured, and of the unauthorized transshipment of the wheat by the carrier at Yokohama. Accordingly, we reversed the judgment, which had been entered for the plaintiff, but without ordering judgment to be entered for the defendant; because, as the judgment had been in favor of the plaintiff, he could not avail himself of an objection which he made in the court below, to the fact which was found by the court, that the *Colorado*, according to the regular course of business pursued by her owners, was bound to perform her voyage to Hongkong, where "connections" were to be made for Batavia; therefore, we remanded the cause for a new trial. A retrial has been had; and the case comes before us on appeal by the plaintiff, from a judgment in favor of the defendant, upon a like finding of facts as in the former appeal.

The facts being the same, the former decision must be regarded as the law of the case. Besides, the exposition of the law contained in the decision is undoubtedly correct. One of the implied warranties of a marine policy of insurance is that the vessel shall not deviate from the voyage declared in the policy. The voyage must be performed in the usual manner, and not voluntarily waived by the assured, or those who represent him. Any voluntary deviation is a change of the risk; it forms a departure from the contract, and

an attempt to substitute another; and the legal effect of it is to discharge the insurers from liability for any loss happening to the things insured subsequently to the unauthorized deviation: Section 2,697, C. C. The reason of this is the voluntary substitution of another voyage for that which has been insured. "The discharge of the underwriters from their liability in such cases," says the Supreme Court of the United States, "depends not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance:" *Maryland Ins. Co. vs. Leroy*, 7 Cranch., 30.

But the shipper in such cases is not without remedy for his loss. The remedy, however, is against the carrier of the goods and not the insurer. By the breach of his implied warranty against deviation from the voyage, the owner of the ship becomes liable to the owner of the goods in case of loss: *Crosby vs. Fitch*, 12 Conn., 410. So in *Goddard vs. Mallory*, 52 Barb., 87, it was determined that "neither agents nor the owners of a vessel can send goods by a vessel other than that named in the bill of lading, without assuming the whole risk of loss or damage to the goods on such other vessel." And in the *Maggie Hammond*, 9 Wall., 458, the court says: "As agent of the owners, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by or from some act of the shipper, or from some one of the perils expressly excepted in the contract of shipment." *Trott vs. Wood*, 1 Gall., 442; *Shipton vs. Thornton*, 1 P. & D., 216, 231; s. c., 9 Ad. & E., 314, 332; *Wilcox vs. Parmlee*, 3 Sandf., 610; *Emerigon on Ins.*, 339; *Lee's Law of Ship. and Ins.*, 412.

But on the retrial, after the defendant had proved that the invariable practice and usage of the company's steamers, bound from San Francisco to Hongkong, with freight for Batavia, was to perform their voyages by way of Yokohama to Hongkong, there to discharge such freight and store it to await "connections" for Batavia, the plaintiff offered in rebuttal the bill of lading issued by the company to the consignor, and in connection with it proposed to prove by witnesses that bills of lading of like form had always been adopted by the steamship company; that that form was well known to all underwriters in San Francisco, and was a matter of notoriety and established usage; and that, by the usage of the business community in San Francisco, such bills of lading tacitly formed part of the contracts of marine insurance. Against the exception of the

plaintiff the court sustained the objections to the offers, and excluded the evidence, and that constitutes the principal assignment of error on the present appeal.

We think the bill of lading did not tend to rebut the existence of the invariable practice and usage as to the voyages of the company's steamers, proved by defendant. On the contrary, it tended to prove that the carrier contracted to transport the wheat, on board the *Colorado*, for the entire voyage from San Francisco to Hongkong, and thence with connections to Batavia. The obligation arising from the contract was, therefore, to perform the voyage as laid down in the bill of lading; and, in that respect, the contract of affreightment co-incided with the contract of insurance—both contracts covering the same voyage. It is true the bill of lading also contained the following clauses, viz: "With leave to transship the wheat to any other of said company's steamers \* \* \* unto the port of Yokchama, \* \* \* thence to be transported by steamer or steamers of the Pacific Mail Steamship Company (with like exceptions, privileges, and exemptions) unto the port of Hongkong; and there, in like apparent good order and condition, to be delivered at vessel's tackles unto the agent of the Pacific Mail Steamship Company at Hongkong, to be forwarded by him, per steamer to Messrs. Busing, Schroeder & Co., Batavia, or his or their assigns." \* \*

But these clauses only tended to prove that the company claimed, or attempted to reserve, the privilege of departing from the usual route of their steamers bound from San Francisco to Hongkong, by way of Yokchama, and of transshipping at Yokohama instead of at Hongkong, from the steamer on which they were laden, the goods bound for Batavia. Such a claim, however, although expressed in the bill of lading and known to the consignor, was not binding upon him unless he expressed his assent to it by his signature to the bill of lading. Section 2,176 of the civil code declares: "A \* \* \* consignor \* \* \* accepting a \* \* \* bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place, and manner of delivery therein stated \* \* \* and to any limitation of the liability of the carrier in case of loss or injury; but his assent to any other modification of the carrier's obligation in such instrument can be manifested only by his signature to the same." But the bill of lading offered in evidence was not signed by the consignor; therefore it did not tend to prove assent on his part to any deviation from the voyage, upon which he had obtained the policy of insurance; nor did it tend to prove a

modification of the obligation arising from the contracts of affreightment or insurance for the regular and customary voyage covered by the bill of lading and the policy of insurance; consequently the clauses in the bill of lading did not affect the rights of the consignor, nor of his insurers, who were with him interested in the carriage of the wheat.

Besides, there was no proof, nor any offer to prove, that the privilege thus claimed, or attempted to be reserved, by the company, in the bills of lading which it issued, had ever been exercised, except in the single instance in which the loss of the wheat had occurred. The parties to the policy of insurance did not, therefore, contract with reference to it; nor did it amount to such a usage of business or trade as impliedly entered into the contract of insurance; and as it was inconsistent with the contract it was inadmissible in evidence. "Usage should not be regarded at all, unless it be of such a character as may be supposed to influence parties to a contract; and none can be ordinarily presumed to do this but such as is public and continued. Therefore, it is not sufficient to prove a few instances, not amounting to general practice, as an excuse of what otherwise would be a deviation:" *Crosby vs. Fitch*, *supra*.

There is no prejudicial error in the record.

Judgment and order affirmed.

MCKINSTRAY, J., and ROSS, J., concurred.



## SUPREME COURT OF NEW HAMPSHIRE.

JANUARY TERM, 1885.

MARY A. COWLES

vs.

CONTINENTAL LIFE INS. CO.\*

The policy was described in the margin of that instrument as non-forfeiture endowment, ten annual premiums, payable \$42.82 note, \$64.22 cash, each twelve months. It stipulated that if the insured failed to pay the premiums when due and the interest annually in advance on any outstanding notes, or should not pay any such notes at maturity, the policy should cease and determine, and the company should "not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided;" that if after the receipt of two or more annual premiums, default should be made in the payment of any subsequent premium, the policy should be converted into a proportional paid-up policy, provided it should be transmitted to the company and application made within one year from date. Default was made and an application sent agreeing to quit-claim to the company all claims except for the proportional amount, and to pay the interest in advance on outstanding notes. Thereupon the company indorsed upon the policy a recognition that it was binding for the proportional amount, subject to the terms and conditions in the policy and quit-claim.

*Held*, That the failure to pay interest subsequent to the commutation, and after the expiration of ten years, did not work a forfeiture.

## STATEMENT OF CASE.

The principal facts sufficiently appear in the syllabus. The policy contained the following provisions:—

Provided always, and it is hereby declared to be the true intent and meaning of this policy, and the same is granted by the company and accepted by the assured upon the following express conditions and agreements. \* \* \* Third. That this policy shall not take

\* Decision rendered, July 31, 1885.

effect, not become binding on the company, until the advance premium hereon shall have been actually paid during the lifetime of the insured; and no premium on this policy shall be considered as paid, unless a receipt shall be given therefor, signed by the president or secretary of the company; and that, if the assured shall not pay the said annual premiums on or before noon of the several days hereinbefore mentioned for the payment of the same, and the interest annually in advance on any outstanding premium-notes which may be given for any portion thereof, or shall not pay at maturity any notes or obligations given for the cash portion of any premium or part thereof—then and in every such case, this policy shall cease and determine, and said company shall not be liable for the payment of the sum insured or any part thereof, except as hereinafter provided.

Fourth. That if, after the receipt by this company of two or more annual premiums upon this policy, default shall be made in the payment of any subsequent premium when due, then, notwithstanding such default, this company will convert this policy into a "paid-up" policy for as many tenth parts of the sum originally insured as there shall have been complete annual premiums paid, when such default shall be made; provided, that this policy shall be transmitted to and received by this company, and application made for such conversion, within one year after such default.

*A. L. MELLONS, for Plaintiff.*

The finding of the court, at the trial, was correct. The policy, together with the supplementary agreement, when the policy was converted into a "paid-up" policy, constitutes the contract between the parties. The intention of the parties is the first consideration; and this intention is to be gathered from the most obvious and natural construction of the language they have used. Nothing can be added to, or taken from, this agreement. Courts cannot adopt a construction of any legal instrument, which shall do violence to the rules of language or the rules of law. The terms of the contract are to be understood in their plain, obvious, and popular sense.

Parsons on Contracts, Vol. 2, Page 7, Sec. II., ed. 1857. Addison on Contracts, Vol. 1, Page 336, Chap. 2, Paragraph 220. Smith on Contracts, Page \*327.

The only question raised by the case, or at the trial, is whether the plaintiff is bound, by the terms of the policy, to pay interest upon these notes after the expiration of ten years from the com-

mencement of the risk. In the body of the policy it reads: ———  
“and of the annual premium of one hundred and seven dollars and two cents,” and in the margin, “10 Annual Premiums, \$107.02.” Of this sum, \$64.22, or 60 per cent, was to be paid in cash; and \$42.80, or 40 per cent, was a note upon which interest was to be paid. For what time? Certainly for the same number of years required for the payment of the premiums, and no more. This is the plain, obvious, and most natural construction to be put upon this language.

If the condition had been that the whole premium should be paid in cash, it would most certainly be limited to ten years. If the policy had not been converted into a “paid-up” policy, and the \$64.22 cash premium had been paid for the full term of ten years, would it be contended, upon the construction of this language, that the payment of interest is required upon the notes after the time for the payment of the cash part of the premium had expired? Certainly not.

The conversion of this policy into a “paid-up” policy, does not, in any particular, change or modify the conditions in this respect.

WILLIAM H. HACKETT, *for Defendant.*

If the plaintiff can recover in this case it must be upon a literal compliance on her part with the written contract. The terms of the policy are the law of the case and must be complied with strictly.

The policy provided these causes of forfeiture:—

1. Failure to pay annual premiums.
2. Failure to pay interest annually in advance on the notes.
3. Failure to pay at maturity the notes or obligations.

The saving clause providing for paid-up policies, applies only where forfeiture is by reason of failure to pay the premiums.

By a failure to pay interest or to pay outstanding notes given for cash portion of premiums, the right to a paid-up policy is taken away and forfeiture becomes absolute. The saving clause does not apply in these two latter cases.

A similar question arose in case *Continental Life Insurance Co. vs. J. M. Robinson*, decided in Supreme Court of Ohio in 1883, reported in the *INSURANCE LAW JOURNAL*, p. 292, Vol. 13 (April, 1884). The numerous authorities therein cited sustained the position that where a policy provides that a failure to pay interest annually in advance

on outstanding notes, taken for a premium, or any part thereof, avoids the policy; the failure so to pay such interest making a forfeiture has been frequently settled, and in addition to the numerous authorities cited on p. 293, *INSURANCE LAW JOURNAL*, April, 1884, I refer the court to *Ins. Co. vs Bonner*, 36 O. S., 51; *Continental Ins. Co. vs. Robinson*, 13 *INS. LAW JOURNAL*, 292, and cases there cited; *Thompson vs. Knickerbocker*, 104 U. S., 258; *Attorney Gen. vs. North American Life Co.*, 82 N. Y., 172; *N. Y. Life Ins. Co. vs. Stratham et al.*, 93 U. S., 30; *Continental Life Ins. Co. vs. Benj. Kamp*, Ohio Sup., and Ct. Com'srs, March 6, 1884.

By the terms of the policy there was to be an annual payment of \$107.02, with the option extended to the insured of paying cash \$64.22, and note \$42.80,—it being conceded that interest was to be paid in advance on the \$42.80; this cash to be paid and note to be given in each year during the continuance of the policy for the term of ten years. Upon the performance of this contract the company undertook to pay in the manner prescribed.

If there were no conditions the insured must, clearly, in order to entitle him to receive his money, make ten payments of premium in the manner and form described. It will be observed that the policy this far takes no cognizance of interest—the subject treated being premium. In the 3d and 4th conditions of the policy, however, certain conditions are inserted, having the effect, among others, to release the insured from his obligation to pay the premiums for the full term of ten years, and according to him certain other rights; but specifically requiring payment of interest annually in advance on the outstanding premium notes,—whether this interest be upon the note given for the second or the tenth premium. If there be an outstanding premium note then interest must be paid thereon, so long as it be outstanding, during the continuance of this policy.

Suppose a note had been given for the cash part of the tenth premium, on one year's time; would the insured have been, under the terms of the policy, released from the obligation of paying interest thereunder, or from liability from forfeiture if the note were not paid at its maturity?

DOZ, C. J.

The contract in this case was made attractive by an advertisement in the margin of the policy conspicuously setting forth its non-forfeiture character; and a non-forfeiture clause was inserted in the body of the instrument, provided that after the payment of two or

more annual premiums, partly in premium notes and partly in cash, forfeiture could be avoided by requiring the company to convert the policy into a paid-up policy for an amount proportioned to the amount of notes and cash delivered in payment of premiums. There is no clause of the policy that can be construed to nullify the effect of the non-forfeiture stipulation. The policy having been converted into a paid-up policy, the non-forfeiture clause is thenceforth a controlling article of the contract.

By a previous clause the policy was to be forfeited by the non-payment of the annual premium in note and money, or the non-payment in advance of interest on outstanding premium notes. But this premium is for forfeiture "except as hereinafter provided," and is immediately followed by the stipulation for avoiding forfeiture by requiring the conversion of the policy into one of that is paid-up.

Nothing is said of any non-payment, forfeiting the policy after it becomes paid-up. The meaning is that the conversion by which forfeiture for non-payment of anything is avoided, is substantial and effective, and not nominal or delusive; that the reformation of the contract on that point is neither feigned nor incomplete. The whole theory of reconstruction is that the danger of forfeiture from non-payment is at an end. Any other interpretation misleads the insured, and fraudulently exposes him to the very danger from which he would reasonably understand he was to be delivered by the saving process of conversion worked in the policy. Forfeiture is an extreme remedy and not to be inferred upon any unnatural presumption.

A deduction of "an indebtedness to the said company" from the sum insured when the latter is paid, is one of the alluring items of the contract so printed as to be likely to be read; and the fine print contains no such clear stipulation for a forfeiture of the converted and paid-up policy as would be expected, if in its new and reformed character it was still forfeitable for an annual non-payment. The next edition of non-forfeited policies may contain in the part so printed as not to be easily read an express and unmistakable provision, making a paid-up policy forfeitable for annual non-payment of something, as it was before its conversion. The omission of such a clause in the edition may have been a typographical error, or an oversight of the draughtsman that can be easily corrected. This instrument in the suit at law must be taken in the form in which it became conclusive evidence of the contract of the parties.

The forfeiture clause provides that the "company shall not be lia-

ble for the payment of the sum insured or any part thereof," but the next words are "except as hereinafter provided," referring to the next stipulation for avoidance of forfeiture by conversion, which cannot be understood to be qualified by the preceding forfeiture clause, and can be understood only as a provision for avoiding forfeiture by any non-payment.

The three notes, dated May 20, 1870, 1871, and 1872, and payable each in twelve months, are silent on the subject of interest and the subject of forfeiture.

The written instrument of conversion, signed by the secretary of the company, stipulates that the policy having lapsed is "recognized as binding upon the company for three-tenths thereof, or three hundred dollars, subject to the terms and conditions in the policy and in the quit-claim to the company.

The terms and conditions of the policy do not attach to the new contract that character of forfeiture for some annual non-payment from which it was the object of conversion to purge the old one, and the quit-claim is silent on the subject. It contains an agreement of the insured and assured "to pay to said company annually in advance the interest on all outstanding notes given in part payment of annual premiums," but the premium, like each of the notes, is a mere promise to pay money, and like each of those promises, is not a contract of forfeiture for non-compliance of the promise. Each note was due twelve months after date; for non-payment when due, the defendants could recover interest as damages in a suit on the notes; and the quit-claim contained a promise to pay interest.

The defendants are entitled to interest, but not to a forfeiture.

Exceptions overruled.

## SUPREME COURT OF MICHIGAN.

SIBLEY

vs.

PRESCOTT INS. CO.\*

The assignee of an insolvent in Michigan has an insurable interest and may insure as assignee before having filed the required bond.

The fact that the property was already insured by the assignor, and such policies came to him as assignee, will not defeat recovery.

Where the company repudiated all liability, recovery will not be limited to the amount shown in the proofs of loss where such amount is less than the sum found due by the court.

JOHN H. BISSELL, *for Plaintiff.*

DICKINSON, THURBER & HOSMER, *for Defendant and Appellant.*

COOLEY, C. J.

This cause was tried by the circuit judge without a jury, and the facts as found are substantially as follows :—

January 28, 1884, Thomas Swan, of Detroit, made a voluntary assignment to the plaintiff for the benefit of his creditors, under the "Act to provide for the regulation and enforcement of assignments for the benefit of creditors," approved May 13, 1879 (Pub. Acts, 181). The assignment and the acceptance thereof by the plaintiff were duly filed, January 29, 1884. The property assigned consisted chiefly of a stock of goods and fixtures and furniture, upon which there was at the time insurance in name of said Swan to the amount of \$23,250 on the stock, and \$12,550 on the fixtures and furniture. There was a policy in the Franklin Insurance Company to an amount of \$5,000, and upon hearing of the assignment, John G. Erwin, agent

\* Opinion filed, May 13, 1885.

of said company, went to said Swan and plaintiff, and canceled the policy under a provision therein contained. Plaintiff then asked said Erwin to procure other insurance in place thereof, and said Erwin requested George W. Chandler, agent of defendant, to issue policies to said plaintiff, and on February 1st said Chandler sent to said Erwin's office the policy declared on in this cause, and another policy of like tenor in the Kings County Insurance Company.

The policy in suit was issued to plaintiff as assignee, and insured him to amount of \$2,500,—\$1,250 on the stock and \$1,250 on furniture and fixtures assigned,—but not exceeding his interest in the property. The policy also contained a warranty that the assured had not omitted to state any information material to the risk, and the further provision that the policy should become void, if the assured was not the sole and unconditional owner of the property, or if the interest of the assured in the property, whether as owner, trustee, factor, agent, mortgagee, lessee, or otherwise, was not truly stated therein. There was a mortgage on the stock at this time, made by Swan to the Detroit Savings Bank. February 5, 1884, before Sibley had filed his bond and qualified as assignee, there was a fire, and the property insured was damaged by fire. Two days later Sibley qualified as assignee by filing the statutory bond and inventory. An adjustment and appraisal of the loss was made between the plaintiff and the several insurance companies who had issued policies upon said stock to said Swan, but that said defendant and Kings County Insurance Company did not join in such adjustment and appraisal, but the apportionment of loss was arranged as if the defendant and Kings County Insurance Company were to share in the loss. The schedule (page 9, record) shows the adjustment and apportionment of losses as then made; that said Sibley received, as assignee of said Swan, the several amounts apportioned to the several companies as shown in said schedule, except in the case of this defendant, and made proof of loss to said defendant for the amount which would have been apportioned to this defendant if it had participated in the adjustment with the other companies as shown in said schedule, \$747.45. The actual loss on furniture and fixtures, as found by the court, was the sum of \$7,378.14, and on the stock the sum of \$3,199.94, making a total loss of \$10,578.08, though it does not appear but that Sibley knew the full loss when he made his proof of loss, or that he was under any misapprehension of the real facts. That portion of loss chargeable against the defendant was the sum of \$922.80.



Plaintiff brought suit on the policy. The defendant insisted under the foregoing facts—First, that plaintiff, not having filed his bond as assignee, had no insurable interest; second, that if he had any interest, it was only in event of loss before filing his bond, being the difference between the amount insured in Swan's name and the value of the property; third, that even if the company were liable, they could not be held for more than the amount claimed in the proof of loss, in the absence of some showing of mistake as to the amount of loss when such proofs were made; fourth, that such policy was void, not only from failure to disclose information material to the risk, but also under the express provisions providing that if plaintiff was not sole and unconditional owner, etc., or if his interest was not truly stated in the policy.

Upon this finding of facts the circuit judge found as conclusions of law that the plaintiff had an insurable interest in the property; that the policy was valid, and that plaintiff was entitled to recover of defendant, as its proportion of the loss, the sum of \$922.80, with interest. Defendant brings error.

The defendant contends that under the statute no interest in the property passed to the assignee until after he had duly qualified by the filing and approval of his bond. In support of this contention, reliance is placed upon the first section of the act (How. St., § 8,739), which is copied in the margin. In connection, the sixth and last section is also given.\*

\* Sec. 8,739. The people of the State of Michigan enact that all assignments commonly called common-law assignments, for the benefit of creditors, shall be void unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor, [not] exempt from execution, and unless such instrument of assignment, or a duplicate thereof, an inventory of the assigned property, a list of creditors of the assignor, and a bond for the faithful performance of the trust by the assignee shall be filed in the office of the clerk of the circuit court of the county where such assignor resides; or, if he is not a resident of this State, then of the county where the assignee resides. If neither are residents of this State, then of the county where the assigned property is principally located, within ten days after the making thereof. Such assignment shall convey to the assignee all property of the assignor not exempt from execution, and all rights, legal or equitable, of said assignor: provided, that no such assignment shall be effectual to convey the title to the property of the assignor to the assignee until such bond shall be executed, filed with, and approved by said clerk; and provided, further, that no attachment or execution levied upon any assigned property of said assignor, after such assignment, and before the expiration of the time provided herein for filing such bond, shall be valid or create any lien upon such property.

The sixth and last section is as follows:—

In case there shall be any fraud in the matter of said assignment, or in the execution of said trust, or if the assignee shall fail to comply with any of the provisions of this act, or fail or neglect to promptly and faithfully execute said trust, any person interested therein may file his bill in the circuit court in chancery of the proper county, for the enforcement of said trust; and the court, in its discretion, may appoint a receiver therein, and the court shall have power to order the summary examination before himself, or a circuit court commissioner, of any party or witness, at any stage of said cause relative to the matters of said trust, and enforce attendance and the giving of testimony therein in the same manner as in the trial of causes in such circuit courts in chancery.

The question thus raised is not altogether a new one in this court. In *Fuller vs. Hasbrouck*, 46 Mich., 78, s. c., 8 N. W. Rep., 697, it appeared that the mercantile firm of Hasbrouck & Hill had made a general assignment for the benefit of their creditors to O. J. Fast, and that Fast had accepted the trust, taken possession of the property, made an inventory, and given notice to creditors, but had failed to give the statutory bond within the ten days. Immediately on the expiration of the ten days, several creditors sued out attachments and made levies, and certain secured creditors also took possession under their mortgages. Complainants, who were unsecured creditors, then filed a bill in equity, setting forth all the facts, and praying for the appointment of a receiver and the execution of the trust under the assignment by him. The circuit court dismissed the bill, but this court reversed the decree, and held the complainants entitled to the relief prayed.

The court reached this conclusion on a consideration of the general intent of the statute, which was that the property of insolvent assignors should be equally distributed among all their creditors. "To this end it prohibits the giving of preferences, and requires security for accounting and frequent reports from the assignee. If preferences are fraudulently attempted, the intervention of equity to prevent it is authorized, and if the assignee shall fail in any particular in the discharge of his duty, equity may displace him with a receiver who shall discharge the trust impartially." It is true that the statute declares the assignment "void" if the bond is not filed; "but this word is frequently used in the sense of voidable, and it must have that construction here, if it shall be necessary to give other provisions of the statute effect. The assignment, as an effective trust in the hands of the assignee, undoubtedly becomes inoperative, and will remain so, and in a certain sense void, unless creditors take steps to save the trust and have it enforced in equity."

This, it was said, was what the statute means. But no opinion was intimated as to what might have been the result if it had appeared that the assignee had never assumed the trust, or done any act in furtherance of it. In that case, there had been distinct acts of acceptance; possession taken and notice given; everything in fact done which could be done before the giving of the bond.

We have seen no reason to change the views here expressed. The acceptance of the assignment and the taking possession of the property create a trust with the assignee as trustee, and the assignee may defend the trust by the institution of any necessary suits for the purpose. *Coots vs. Radford*, 47 Mich., 37; s. c., 10 N. W. Rep. 69. The trusteeship is, indeed, for the time being imperfect, for he cannot proceed in its execution before the bond is filed. It is subject to a contingency in the nature of a condition subsequent which may defeat his power to act without destroying the trust; but that, in the mean time, he may do whatever may be found necessary for the protection of the interests of the beneficiaries in the assigned property is recognized by the case just cited. The assignor has transferred to him the legal title for that purpose, and his power to act as trustee is merely suspended for the time being, until certain acts shall be done which are essential to give due protection to parties concerned. But that he may insure the property against destruction by fire in the mean time we have no doubt. He may do so just as properly and with as much right as he may by force or by suit defend his possession against trespassers. But it is further contended that this does not make the plaintiff sole and unconditional owner, and as his interest was not truly stated in the policy, the policy is void for that reason.

The policy was issued to the plaintiff as assignee. The defendant was therefore appraised that the plaintiff was not asking insurance in his own right, but in some right which had come to him by assignment. The statement in that regard in the policy was true as far as it went, and if defendant wanted anything further it should have been called for. There was no deception and no concealment in the case; plaintiff had such ownership of the property as was in any one; and though it was not unconditional, the designation of the plaintiff as trustee would be sufficiently suggestive of a condition to put the insurer upon inquiry. If the defendant failed to make inquiry, it must be deemed satisfied with such information as it possessed.

An argument is also made that the plaintiff had no insurable interest because the policies, which passed to him with the assignment,

more than covered the loss. But this, we conceive, is at best only specious. Whether the policies came to him with the trust, or whether he took them out himself, would make no difference; he had the property with the policies upon it, and might take out further insurance as any owner might, subject to the customary conditions as to information, overvaluation, etc.

The last argument requiring notice is that plaintiff is bound by his proofs of loss, which made the amount less than the judge found. The argument might be sound if there were any element of estoppel in the case, but there is not. The defendant refused to act upon the proofs, and repudiated all liability. The plaintiff was therefore put to legal proofs in court; and there is no ground, legal or equitable, on which the defendant can insist on holding him to proofs which are only made with a view to adjustment without litigation, but which the defendant himself repudiates.

The judgment must be affirmed.

The other justices concurred.

## SUPREME COURT OF TEXAS.

BRITISH AND FOREIGN MARINE INS. CO. }

vs. }

G., C. AND S. F. R. R. CO.\* . }

When a bill of lading and an insurance policy covering any loss of the goods named in the former are signed at the same time, but the policy describes the property as having been already shipped by the carrier, the insurance company will be held to be effected with notice of any reservation in the bill of lading and chargeable, with notice of the circumstances of the contract for its transportation entered into between the shipper and the carrier.

Therefore, the insurance company is held to have contracted with the full understanding that in case of loss of the property while in charge of the carrier, and that loss was satisfied by said carrier, it would be entitled to the insurance due upon the property.

To an action by the shipper for the value of the goods the carrier could not plead that it was not liable because of the insurance, and that the shipper must look to the insurance company.

In taking insurance the carrier does not limit its common-law liability to the shipper for any loss that may occur. There is no contract of exemption against liability for loss by negligence; no agreement that the carrier shall be indemnified, but the contract is simply that in the contingency of insurance, a consequent benefit in case of loss will result to the carrier.

The carrier has the right to insure the goods in his charge by a contract made directly with the insurance company, and this he may do to the extent of their full value.

As between the insurance company and the carrier, the former is liable to the latter for any loss of goods occurring.

C. L. CLEVELAND, *for Appellant.*

BALLINGER, MOTT & TERRY, *for Appellee.*

WILLIE, C. J.

The important question in this case arises out of the provision contained in the bill of lading executed by the appellee to Z. Murray &

\* From *Texas Law Review*.

Co., to the effect that in case the property was destroyed the carrier liable for the loss should have the full benefit of any insurance effected upon, or on account of said property. The question is whether or not, with that reservation in the bill of lading, the appellant, in whose company the insurance had been effected, can recover from the railroad company the value of the cotton destroyed after having paid the sum to the shipper. It is a conceded fact that the cotton was destroyed by fire, and in such a manner as would not have excused the railroad company at common law. It appears from the record that while the bill of lading and certificate of insurance were both executed on the same day, the former was prior in time, for the certificate of insurance describes the cotton as having been already shipped by the railroad company. Hence, it must follow that the appellant was affected with notice of the reservation contained in the bill of lading. The insurance company, knowing that the property was in charge of the railroad company as a common carrier at the time, is chargeable with notice of the circumstances of the contract for its transportation entered into between the carrier and the shipper of the cotton. This being the case, the insurance company must be held to have contracted with the full understanding that in case of loss of the cotton whilst in charge of the appellee, and that loss was satisfied by the railroad company, the latter would be entitled to the insurance money due upon the cotton, unless the reservation in the bill of lading was such as could not be made and was, therefore, void and of no effect. This disposes of the point made, that the insurance company, being entitled to the shipper's rights and remedies against the carrier, could not be deprived of them by any contract between the carrier and the shipper to which the insurance company was not a party. The insurance company had no rights against the appellee when the bill of lading was signed and the reservation was made, but, on the contrary, the railroad company had all the right which the reservation could give it as against the appellant company at the time the insurance was effected.

If, therefore, the question depended on the right of two parties to interfere with the contract of a third by an agreement between themselves alone, we would be compelled to hold that neither the certificate of insurance nor the transfer by the owner of the cotton to the insurance company was of any avail, as against the previous contract between the shipper and the railroad company. The whole question, therefore, turns upon the right of the appellee to make the reservation as to the insurance money in its bill of lading.

This right is questioned on the ground that the reservation is in effect a limiting of the common-law liability of a carrier for the loss of goods transported by him, a limitation prohibited by the statutes of our State. It is said that by allowing the carrier to re-imburse himself out of the insurance money we relieve him of all responsibility and permit him to deal with the property in his charge as carelessly and negligently as he pleases, and yet save him from accountability in case of its loss.

It is perhaps true that the carrier is enabled by such contract to indemnify himself for any money he may pay out on account of the loss of the goods, but does this relieve him from responsibility, or limit his liability in the least? To an action of the shipper for the goods he could not successfully plead that he was not liable because of the insurance, and that the shipper must look to the insurance company for compensation. It would be no defense to the action, and the carrier has not, therefore, limited his liability to the person with whom he has contracted. The shipper has all the rights and remedies against the carrier he would have possessed had no such reservation been made. If the goods are lost from other causes than the act of God or the public enemy, the carrier is liable; and it is no concern of the owner that after the loss is compensated by the carrier, the latter can seek re-imbursement at the hands of some one else.

But it is said to be against public policy to allow such reservations in the bill of lading, because it lessens the necessity for care and diligence on the part of the railroad company, in reference to the property in its charge for transportation. This may be so in some measure, but it certainly does not release the company from liability, or place them in the same position as if they had contracted that they should not be liable either in whole or in part for the loss of the goods, unless they would be so liable at common law.

There is a great difference between contracting for a limit of common-law liability, and contracting to be fully liable as at common law, but to have the privilege of indemnifying against loss by reason of such liability. Besides, the owner does not bind himself to insure, or to do anything which will result in the benefit of the carrier. "There is, therefore, no contract of exemption against liability for loss by negligence; no agreement that the carrier shall be indemnified, but the contract simply is that in the contingency of insurance, a consequent benefit will, in case of loss, result to the carrier."

Rintoul vs. N. Y. Central and H. R. R. Co., 16 Am. and Eng. R. R. Cases, 144.

The carrier has the right to insure the goods in his charge by a contract made directly with the insurance company, and this he may do to the extent of their full value. Fland. on Ins., 380; May on Ins. 80; Lawson on Con. of Carriers, 391, 392; Hutchinson on Con. of Car., sec. 429; Van Natta vs. Ins. Co., 2 Sandf., 990; Ins. Co. vs. Cobbs, 20 N. Y., 177. This is upon the principle "that every person who would be liable in the event of the loss of the property may effect an insurance for his own protection." Hutch. on Car., sec. 429.

The carrier needs no protection against losses for which he is not liable under his contract with the shipper, and if not allowed to insure against those for which he is liable, the policy of insurance is of no use as a protection to himself. It is clear that if the want of power in a carrier to limit his common-law liability deprives him of his right to indemnify himself against loss, he cannot contract for such indemnity directly with an insurance company any more than he could through his agreement with the owner of the property. If we look to the effect or result of the two contracts, we find that the carrier's liability is restricted as much by the one as by the other, and if the one is against public policy the other is also. If there be any difference it is restricted to a greater degree by the contract made by the carrier with the insurance company. That positively indemnifies him against loss; the other indemnifies only upon the happening of a contingency.

When a railroad company, as in the present instance, pursues the latter course, and the owner insures and a loss covered by the policy and the bill of lading occurs, the railroad stands substantially in the same position toward the shipper and the insurance company as if it had insured by direct contract. The railroad company is primarily liable to the owner of the goods for their value if destroyed. The insurance company is also liable to the owner to the extent of the loss covered by the policy in trust for the benefit of the carrier. The owner has a right of action for the value of his property, either against the railroad company or against the insurer.

We have seen that the fact that the carrier had a right to re-imburse himself from a third party for losses under the bill of lading forms no defense to an action against him by the shipper. He must pay the value of the property destroyed and then bring suit against the party liable to him under the contract of insurance. This is the case



whether the carrier has insured or has reserved the benefit of the insurance obtained by the owner, especially under our system of jurisprudence, when suits may be prosecuted in the name of the true or equitable owner of the cause of action.

But, if the insured proceeds first against the insurer and recovers under the policy, or it is paid by the latter without suit, can he then bring suit upon the bill of lading against the carrier?

A complete answer to such suit, although brought for the benefit of the insurer, would be the reservation contained in the bill of lading, to which the plaintiff was a party. To recover the value of the property destroyed and appropriate it to the insurance company would be in direct violation of that stipulation, and the suit brought directly by the insurer is in no better condition. The right to assert such a stipulation as the present, in a bill of lading, is universally admitted, or denied, if at all, only on the ground of the supposed effect it has of restricting the common-law liability of a carrier. This as we have chosen in our own view, is not the effect of the reservation. If it is a legal stipulation it must have some effect, and if it does not protect the carrier against losses which he must make good under the bill of lading, it is entirely nugatory.

The right of the insurance company to recover against the railroad, if it existed at all, was the result of an equitable subrogation to the remedy of the owner of the cotton against the carrier, and of the assignment made subsequent to its loss. But the assignment was doubtless, as it was made in privity and subordination to the previous stipulation placed in the bill of lading, and subrogation was of no avail, as no one can become subrogated to a right which the party, originally possessing that right, had previously contracted should not be enforced.

The question is of the first impression in Texas, and as controlled by a statute similar to our own upon the subject of common carriers, has perhaps never received the adjudication of a court of last resort. Sec., 30 N. Y. Rep. It has, however, in two or three instances been passed upon and in accordance with our own views by courts of eminent learning, to whose opinion great deference is due. *Caestian vs. Ins. Co.*, 16 Am. and Eng. R. R. Cases, 142; *Rintoul vs. R. R. Co.*, *idem*, 144; *Lawson on Con. of Car.*, p. 383.

We think that the court did not err in rendering judgment in favor of the defendant below, and that judgment is affirmed.

*Affirmed.*

SUPREME COURT OF IOWA.

*Appeal from Buena Vista District Court.*

STORM LAKE BANK

vs.

MISSOURI VALLEY LIFE INS. CO.\*

On examination of the evidence in this case, *held*, That the agency between the parties on which plaintiff bases his right to relief is not shown, and that he is not entitled to recover.

Plaintiff brought action to quiet the title to eighty acres of land in Buena Vista County. It is alleged in the petition that, prior to the fifteenth of May, 1881, plaintiff was the owner in fee-simple of said land, and that it then sold and conveyed the same, by warranty deed, to one James F. Foy, and that it is liable on its warranty for any clouds upon the title, or any incumbrances on the land arising or existing prior to said date. It is also alleged that defendant makes some claim to the premises adverse to the title held and conveyed by plaintiff. An abstract of title, attached to the petition, shows that plaintiff claims under a tax deed executed by the treasurer of the county on the eighteenth of November, 1880.

Defendant alleges in its answer that during the years 1876-77-78-79-80 plaintiff was acting as its agent; that plaintiff's business as such agent was to take applications to defendant for life insurance and loans of money on real estate security, and that it had the general supervision of all matters pertaining to defendant's business in

\* Opinion filed, July 22, 1885. From *N. W. Reporter*.

the county, and that it was its duty to carefully guard defendant's interest pertaining to said business in the county; that in November, 1876, one Trapp, who was then the owner of said land, obtained a loan of \$300 from defendant, and gave a mortgage on said land to secure the same, the business with reference to said loan being transacted through plaintiff as agent; that afterwards said mortgage was foreclosed, and the property was sold on special execution for the satisfaction of said debt, defendant being the purchaser, and a sheriff's deed was executed, conveying the property to it; that in October, 1877, the land was sold for delinquent taxes, and plaintiff became the purchaser, and afterwards obtained a deed from the county treasurer under said sale; that it was plaintiff's duty as agent to notify defendant of said delinquent tax, but that it did not notify it thereof, but fraudulently permitted the land to be sold, and became the purchaser thereof while it was acting as defendant's agent. And defendant prays that the tax deed under which plaintiff holds the land be canceled and set aside, and that it be permitted to redeem the land from said sale for delinquent taxes; and that plaintiff be barred and estopped from asserting any title to the land under said tax deed.

By the judgment of the district court it is determined that plaintiff held whatever title it acquired by the tax deed in trust for defendant, and it is barred and estopped by the decree from asserting any title or interest thereunder, except as trustee for defendant. Plaintiff appeals.

ROBINSON & MILCHRIST, *for Appellant*, Storm Lake Bank.

LOT THOMAS and A. D. BAILIE, *for Appellee*, Missouri Valley Life Ins. Co.

REED, J.

Defendant is a corporation organized under the laws of Kansas, and having its principal place of business at Leavenworth, in that State, and is engaged in the business of life insurance. It also loans the money received by it as premiums on the risks carried by it. It had a general agent at Fort Dodge, who had charge of its business in this State. In August, 1876, this agent induced a number of citizens of Storm Lake to form an association which was known and designated as a local board, and the object of which was to procure applications to defendant for life insurance and loans of money. Each member of the board was insured in the defendant company, and it was one of its rules that it would loan money only to persons

who were insured with it. The board had a secretary, who received and forwarded to defendant all applications for insurance and loans of money which were procured by the board during its existence. Plaintiff also is a corporation organized under the laws of this State, and does a banking and general real estate business. J. A. Dean was vice-president of the plaintiff corporation. He was also secretary of said local insurance board. During the time he acted as such secretary he assisted in conducting plaintiff's business, and received a salary from it. The only compensation which was received for his services as such secretary was such fees and commissions as were charged the persons who applied through the board for insurance and loans of money, and these sums were paid over to plaintiff. The president of the plaintiff company was also a member of the local board.

In November, 1876, one John V. Trapp made application for a policy of insurance and a loan of \$300, which he proposed to secure by a mortgage on the land in question. Dean received this application and forwarded it to defendant, and with it he sent an abstract of the title of the land, which was given by plaintiff, it being part of its business to furnish abstracts of title. Trapp's application was accepted by defendant, and the loan was made to him, and a mortgage on the land was taken to secure the same. This mortgage was foreclosed in 1877, and the premises were sold on special execution, defendant being the purchaser, and in December, 1878, it obtained a sheriff's deed therefor. Indorsed on the abstract of title given by plaintiff at the time the loan was made, was the certificate of the county treasurer to the effect that there were no taxes due and unpaid upon the land at the time the certificate was signed, which was November 20, 1876. The taxes for that year, however, had not been paid at that time and they remained delinquent until the annual sale for delinquent taxes in October, 1877, when the land was sold therefor, and plaintiff was the purchaser, and in November, 1880, it obtained from the county treasurer a tax deed of the land.

Defendant contends that notwithstanding the fact that its business at Storm Lake was transacted by Dean, the secretary of the local board, he was not in fact its agent, but that whatever he did in the premises was done for plaintiff, who was the real agent; and that at the time the land was sold this relation continued, and it was then under obligation, by virtue of the relation, to protect defendant's interest in the land, and, consequently, its act in permitting it to be sold for the tax, without notifying defendant that it was delinquent,

was such a fraud upon its rights as will defeat the title acquired by plaintiff under the sale. Or, if it be true that the agency had been terminated before the sale, so that plaintiff owed it no duty by virtue of the then existing relations of the parties, still, as plaintiff had, while acting as its agent, represented that the tax was not due and unpaid, and thereby induced it to accept the mortgage as security for the loan, it was its duty, growing out of the relation which had existed between the parties, when it discovered that the representation was not true (which it did at the time of the sale), to inform defendant of that fact; and that its acts of purchasing the land at the sale, and afterwards procuring a deed therefor, without giving defendant such notice, was a violation of duty and good faith, and for that reason it could acquire no title to the land under the purchase. It will be observed that defendant's claim is based solely on the ground that the relation of principal and agent existed between it and plaintiff at the time of the tax sale, and that the purchase of the land by plaintiff was a violation of the rights and obligations arising out of the relation, or that that relation had previously existed between them, and that the purchase of the land, and the procuring of a deed thereto by plaintiff, without notifying it of the sale, was a breach of the duties which it owed defendant by reason of the former relation. It is not claimed, either in the pleadings or in argument, that defendant is entitled to relief against the tax deed upon any other ground.

The claim that plaintiff was the real agent in the transactions in question, and that Dean was acting for it, we think is not established by the evidence. The relation of principal and agent can be created only by contract. The existence of the relation may be established by proof either of an express contract between the parties creating it, or of such a course of conduct by them as raises an inference or presumption that they have entered into it. The contracts of corporations are necessarily entered into by or through their officers or agents. It is not necessary in every case, in order to bind the corporation, to prove that its officers or agents expressly assumed to bind it by the contract, but a promise or undertaking by it will sometimes be implied in favor of one who has been led to deal with its officers or agents in the belief that they were representing it in the transaction. We find no evidence in this record that any officer or agent of plaintiff ever assumed to bind it by any contract or arrangement of the character of that which defendant claims was entered into, or to make it a party to such contract or arrangement.

And it is proven that it is capable of entering into such contract, or of being bound by it. Nor is there any evidence that defendant or its officers supposed at any time during the course of the business that they were dealing with plaintiff. At no time during the course of the transactions did Dean assume to act in any other than his individual capacity. And there is no reason to believe that defendant or its officers understood that he was acting in any other capacity. All their correspondence was with him individually, and they addressed and treated him as the agent.

There is no proof, then, of an express contract of agency between the parties. Nor are any circumstances established from which such contract can be presumed or implied. And as defendant has failed to establish the single ground of recovery relied upon, its case necessarily fails.

The judgment of the district court will be reversed.

## UNITED STATES DISTRICT COURT OF INDIANA.

EMILE DRIER

vs.

CONTINENTAL LIFE INS. CO., OF HARTFORD,  
CONN.\*

An answer pleading breach of warranty in making false answers to application, casts the burden of proving their truth upon plaintiff.

The application must be strictly construed against the insurer.

To constitute "a complaint" of blood spitting within the application, the blood spitting must have been of the nature of a disease. A question whether there had been any spitting of blood merely, or such a symptom of disease, would have required the disclosure of a single instance, but not so "a complaint" of blood spitting.

A single instance is but an evidence tending to show disease.

Statements by a physician in the proofs of death which are of the nature of privileged communications, are not admissible.

WOODS, J.

Action upon an insurance policy upon the life of Peter H. I. Drier, taken for the benefit of his wife, the plaintiff. By the terms of the policy the application for the insurance was made a part of the instrument, and the answer to questions are especially warranted to be true.

The defense specifically pleaded to the action, is that certain of the answers to questions in the application were false; that to the inquiry, "Has the party had any of the following complaints: \* \* \* 16, pneumonia; 19, spitting or raising of blood; 20, any disease of the lungs?" The answer was, "No," and that to the question what sickness or sicknesses has the party had during the ten years last past," the answer was, "None, except fever—cure perfect." And to

\* Decision rendered, August 14, 1885.

the question, "Is the party now in good health, and does he usually enjoy good health?" the answer was "Yes." That these answers were all and each severally false and a breach of warranty in this: That the assured had been afflicted with pneumonia and had spitting and raising of blood prior to the date of the policy, and had been afflicted with disease of the lungs." This answer in so far as it is well pleaded, casts upon the plaintiff the burden of proving the truth of the answers and warranties in question: *Cont. Life Ins. Co. vs. Kessler*, 84 Ind., 310.

It seems to be an established rule that "the application for insurance must be construed strictly against the insurer." The Supreme Court of Indiana so declared in effect in *Pennsylvania Life Ins. Co. vs. Wiler*, at November term, 1884 (reported in *Ind. Law Journal* for May, 1885). By this rule, as indeed by the terms of the questions on this subject, there is no warranty in this case that the insured never had spitting or raising of blood, but only that he had not had the complaint of spitting or raising blood; equivalent to a warranty that he had not had blood spitting in such form as to be called a disease, disorder, or constitutional vice. See *Conn. Mut Life Ins. Co. vs. Union Trust Co.*, U. S. C. C. Law Reg., January, 1885.

The answer pleaded, it may be observed, does not allege the existence of any such disease or disorder, and therefore really presents no issue upon this point. But we will consider the case as if the issue were made.

If the question put to the applicant for the insurance had been whether or not he had had any spitting of blood, or had had any symptoms of disease, such as spitting or raising of blood, it would doubtless have required the disclosure of a single instance of blood spitting: *Geach vs. Ingall*, 14 Mus. & W., 95, s. c., 2 Life & Ac. Ins. R., 306; *Insurance Co. vs. Miller*, 39 Ind., 475, and *Vase vs. Eagle Life etc. Ins. Co.*, 6 Cush., 42, are cases which illustrate the distinction, and are in this respect different from the case now presented. See also *Cushman vs. Ins. Co.*, 70 N. Y., 72, and authorities cited.

The inquiry now is not whether or not there was a misrepresentation or a false warranty in respect to a symptom of disease, but whether or not the party had actually had the disease, the warranty being that he had not, and consequently the single instance of blood raising proved has significance only as an item of evidence tending to show the presence, but not itself constituting the fact of disease or disorder.



The weight which this evidence should have, depends of course, largely upon the circumstances of the occurrence, and of other portions of evidence, if there be any competent to be considered. There is no other evidence relevant to this point, except certain statements made by Dr. Hadly, physician of the deceased, contained in the proof of death furnished by the plaintiff to the defendant company; and these statements, it is now insisted, come within the rule of privileged communications between patient and physician and therefore cannot be considered.

The court is inclined to this view :—

It is clear that Dr. Hadly could not, against the will of the plaintiff, if called as a witness, have been allowed to testify to the facts contained in these statements: *Penn. Mut. Life Ins. Co. vs. Wiler*, *supra*; *Masonic Mut. Benefit Ass'n. vs. Beck*, 77 Ind., 203; *Conn. Mut. Life Ins. Co. vs. Union Trust Co.*, *supra*.

It is true by the terms of the policy the plaintiff in order to have a right of action was bound to furnish the company within a specified time "satisfactory proof of the death;" but this did not entitle the company to go further and require, as it seems to have done, of the plaintiff a statement by the physician of his knowledge concerning the previous complaints and ailments of the deceased which caused the death; and I see no reason at all why such statements, when so obtained, should become available to the company as evidence in a suit upon the policy, of facts which could not be shown by the testimony of the one who made the statement. The law which declares communications between patient and physician confidential should not be avoided in any such way.

These statements concluded the only evidence that remains to show that the deceased had, or had had any disorder or complaint when he applied for the insurance consists in the fact that four years before he raised blood on one occasion. The evidence shows that the deceased was a blacksmith, and had been of strong and robust appearance, and so continued until some months after the policy sued on was issued.

The defendants' examining physician, a specialist noted for skill in respect to diseases of the throat and lungs, after a careful examination declared him sound and to be "A No. 1. risk."

Upon the particular occasion of blood spitting in question he had been employed for some hours during a hot summer afternoon in heating and setting wagon tires, and in a heated condition had drank freely of cold water. He at once felt ill, went home and took

supper, and was about to retire, when he remarked that there was "something salt" in his mouth, and thereupon two or three times spat out small quantities of blood, which he afterwards said came from his lungs. He went out to consult with his physician, and within a few days went to Wisconsin, where he stayed about two months, then returned home well, and continued, as before stated, in apparent good health until and for some months after the policy of insurance upon his life was issued.

It is not questioned that he died of phthisis pulmonalis. The plaintiff testified that he was taken sick with a cold in September, and died on the 4th of November following; the cause of the death as she understood being quick consumption.

In the opinion of the court it cannot be said to appear upon the competent evidence in the case that the deceased made false answers to questions in the particulars charged or in any respect which constitutes a breach of any warranty contained in the policy and application.

The attendant circumstances corroborated by subsequent long-continued health, and by the medical examiner's report strongly indicate a transient rather than settled cause for the single instance of blood spitting shown to have occurred, and there remains in the case no evidence to justify a different conclusion.

The expert testimony in the case was predicated upon hypothesis which was unsupported by proof.

The plaintiff is entitled to recover the amount of the policy with interest for two years and three months amounting in the aggregate to eleven hundred and thirty-five dollars, with costs of suit.

Ordered accordingly.

## SUPREME COURT OF CALIFORNIA.

ROBINSON

vs.

IRISH-AMERICAN BENEV. SOCIETY.\*

The defendant is a benevolent corporation, its object in part being the relieving and assistance of its sick members, who were entitled, under certain conditions, to an allowance during their illness. Its constitution provided that no money should be withdrawn unless by a majority of the board of trustees, to whom was also given power to examine all claims of members for sick allowance, and if found correct, to order the same paid. *Held*, That the plaintiff, when he became a member of the society, assented to these provisions of its constitution, and could not maintain an action to recover the amount of his sick allowance without having first given the trustees an opportunity to examine his claim.

Appeal from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

M. C. HASSETT, *for Appellant*.

H. A. POWELL, *for Respondent*.

Ross, J.

The defendant is a benevolent corporation, organized under the laws of the State, its object in part being the relieving and assistance of its sick members. The plaintiff became a member in 1869, and has since been a member thereof in good standing, and entitled to all its benefits. The constitution governing the corporation provides for the election of a physician, whose duty it is to attend the

\* Opinion filed, June 23, 1886. From *West Coast Reporter*.

sick members, and, among other things, "give a certificate of bad health when applied to and the case warrants it." It is also provided by the constitution that "any beneficial member of this society who is sick and receives the doctors certificate, shall be entitled to eight dollars per week during the continuance of his illness, provided such sick member shall not be absent from his house later than eight o'clock P. M.; and it shall be the duty of the society's physician to send in a written statement every two weeks, stating how such sick member is getting on, and also send certificate of sickness at the same time, stating the nature of his disease," etc. It is further provided that the board of trustees, provided for by the constitution, and who are required to hold their regular meetings on the Friday evening preceding the regular meetings of the society, "shall investigate all complaints connected with the affairs of the society, and the recording secretary shall report the same at the following meeting. They shall have full power to act in all cases submitted to them by the society, and from their decisions there shall be no appeal. \* \* \* No moneys shall be withdrawn from the deposit, unless by a majority of the board of trustees. They shall also examine all claims of members for sick allowance, and if found correct, order the same paid."

It appears from the record that on the third of October, 1881, the plaintiff demanded of the society payment to him of three hundred and fifty-two dollars, which he claimed to be due him as sick allowance accruing subsequent to November 29, 1880. The claim was presented to the society at its regular monthly meeting, which was held the evening of the day of the demand, and was by the society referred to its board of trustees. Instead of awaiting the consideration and determination of the board, the plaintiff within a few days commenced this suit against the society to recover the amount claimed by him. He undoubtedly did so, as appears from the record, because the physician, at the instance of one of the trustees, had some time before ceased furnishing the plaintiff with a certificate of his illness. It clearly appears from the evidence that plaintiff was sick and unable to work during the time for which he claimed the allowance, and had been so circumstanced for a long time prior thereto. But it is not to be presumed that the board of trustees would, upon the facts being made to appear, have refused to award the plaintiff the relief to which he was entitled. At all events, the plaintiff, when he became a member of the society, assented to the provisions of its constitution and by-laws, and is bound by them.

The constitution of the society in terms provides that the board of trustees shall examine all claims of members for sick allowance, and if found correct, order the same paid. In this case, without even giving the board an opportunity to examine his claim, the plaintiff resorted to suit: See *Anacosta Tribe*, No. 12, *Improved Order of Red Men vs. Murbach*, 13 Mo., 91, and *Van Dyke's case*, 2 Whart., 809.

Judgment and order reversed.

McKee, J., and McKinstrey, J., concurred.

## LOWER COURT DECISIONS.

### INSURABLE INTEREST.—ABANDONMENT.—TOTAL LOSS.

*United States District Court, N. D. Illinois.*

YOUNG

vs.

UNION INS. CO.\*

Where the legal title is in a trustee, he may insure a vessel for the use of the beneficiary.

The policy provided that the insured might abandon if the damage exceeded 50 per cent of the amount insured.

*Held*, That in case of stranding, if the cost of getting the vessel off, and of getting her to a port of safety added to the cost of repairs would exceed 50 per cent, the right to abandon existed.

Delay in giving notice of abandonment will not affect the rights of the insured where such delay has done no injury to the insurer.

Where the insurer, under the sue and labor clause, takes possession for the purpose of saving, and if necessary repairing the property, they must make reparation and return within a reasonable time or keep the property and assume a total loss.

The underwriters who assumed to repair were bound to seek and replace the sails and running rigging, although stored where the insured could easily secure and replace them.

BLODGETT, J.

In this case, libellant seeks to hold respondent for a constructive total loss upon a policy, by which respondent insured to libellant a half-interest in the schooner *H. D. Moore*, her tackle, apparel, and furniture, for the sum of \$2,500, against the perils of navigation upon the lakes, rivers, etc., from the first day of April, 1883, to the

\* Decision rendered, June 15, 1885. From *Federal Reporter*.

thirtieth day of November of that year; loss payable to libelant or to his order. The defenses set up are: (1) That libelant had no insurable interest in the schooner, but that he held the legal title as naked trustee for one James T. Young; (2) that, under the facts in the case, and the terms of the contract of insurance, the libelant was not entitled to abandon the schooner as for a constructive total loss; and respondent is not liable on said policy for such loss.

There is little, if any, conflict in the testimony as to the material facts of the case. It is undisputed that, in March, 1880, James T. Young and one James McMullen purchased the schooner in question from H. D. Moore, each paying one-half the price; that said James T. Young directed that his interest in the purchase should be conveyed to the libelant, and accordingly a bill of sale in due form was executed and delivered by Moore to libelant, and the said McMullen, conveying to each of them an undivided half of said schooner, with her boats, tackle, etc.; that the said James T. Young, from the time of said purchase up to the time of the loss now in question, resided in Chicago, and acted as the manager and ship's husband of said schooner, and had the benefit of the earnings of the half interest standing in the name of libelant; that, at the time the policy now in question was taken out, the agents of respondent were fully informed of the fact that the beneficial ownership was in the said James T. Young, and issued said policy with the knowledge and understanding that libelant was acting as trustee, for said James T. Young, and insuring his interest.

It also appears that on November 13, 1883 and while the policy was in full force, the schooner was stranded in a gale of wind upon the east shore of Lake Michigan, near Kilderhouse Pier; that the captain of schooner telegraphed to the said James T. Young the fact that the schooner was so stranded, and said Young promptly communicated his information to Messrs. Keith & Carr, the agents of respondent in Chicago, and also informed them that the services of a tug and steam-pump would be necessary to get her off. On receiving this information Keith & Carr requested Young to telegraph to Manistee and ascertain if a tug could be obtained there, and at what price. Young sent a telegram to Manistee as requested, and received answer that a tug and steam-pump could be had for \$185 per day. Keith & Carr then engaged the tug and pump, and sent Capt. Blackburn, their own wrecking-master, by rail to meet the tug, and take charge of the work of getting the schooner off. The schooner was got afloat by the aid of the tug and pump on the

twenty-first of November, but, while at work upon the *Moore*, the wrecking-master received instructions from Keith & Carr, respondent's agents, to take the schooner to Northport, about 40 miles from the place where she had been stranded, and then to take the tug to the assistance of another schooner, the *Walmartown*, that had been stranded near Northport.

The wrecking-master followed these instructions, and towed the *Moore* to Northport, which was not a port where she could be repaired, and then went to the relief of the *Walmartown*. Having succeeded in getting the *Walmartown* afloat and towing her also to Northport, Capt. Blackburn, on the seventh of November, attempted to tow the two disabled vessels to Chicago with the tug he had used in getting them afloat; but the weather became so tempestuous that he was obliged to return to Northport, where he laid the *Moore* up for the winter, having employed her captain to remain on board of her as ship-keeper. The proof also shows that the captain of the *Moore* objected to being taken to Northport, and insisted that he should be towed to a port of repair, or be allowed to sail to Chicago, which he testifies he thinks he could have done with safety; but Blackburn, the wrecking-master, told the captain that his orders were to take the schooner to Northport; and he did so against the objections of the captain.

In the latter part of February, the libelant was informed that the charges for the services of the tug and steam-pump had not been paid, and that a libel of the schooner for such services was threatened, and was also informed that the schooner was in danger of being damaged by pounding against the pier or dock along which she was moored in Northport harbor, and on the seventh of March, 1884, notice of abandonment as for a total loss was duly served on the proper agents of respondent, and in apt time thereafter proofs of loss and bill of sale to respondent in due form of all libelant's interest in said schooner, with the consent and by direction of said James T. Young, were duly delivered, or tendered, to the proper agents of respondent, but respondents refused to accept said abandonment. It also appears that, in the latter part of April, the schooner was, by the direction of the agents of respondent, towed from Northport to the port of Chicago, where she arrived on April 30th. Soon after her arrival here, an ex parte survey was made at the instance of the respondent's agents as to the amount of repairs needed to restore the schooner to the condition she was in before



the disaster. And after such survey the schooner was taken to a dry-dock here by orders of the agents of respondent, but, owing to some misunderstanding with the proprietors of the dock as to who was to pay for the needed repairs, she was run out of the dock and remained in the river until about May 24th, when she was again, by the direction of respondent's agents, taken into the dock and repaired in substantial accordance with the survey; and on the eleventh of June she was tendered to the libelant as fully restored to her condition prior to the disaster. The libelant refused to receive her for two reasons: (1) Because he insisted upon his right of abandonment, and to be paid as for a total loss; and (2) because she was not so fully and completely repaired as to restore her to the same serviceable condition she was in before the disaster.

It further appears that respondent paid the captain for his services as ship-keeper from the time the schooner was laid up in Northport until she was put into dry-dock, and also paid the wages of seamen employed to assist in navigating the schooner from Northport to Chicago. It also appears that the expense incurred in getting the schooner off the beach and towing her to Northport, and from Northport to Chicago, and the wages of the ship-keeper until she went into dry-dock for repairs, and the wages of the seamen on the trip from Northport to Chicago amounted to \$2,463.93, and that the expenses for the repairs amounted to \$2,483.37. It is also conceded that at the time of the issue of the policy in question, another policy was issued by the Insurance Company of the State of Pennsylvania for the same amount, on the half-interest of McMullen, co-owner of the schooner with libelant, and that the whole value of the schooner was fixed by the terms of each policy at \$6,500, thus making the owners insurers for \$750 each. And also that the same agents, Keith & Carr, represented the insurers in both policies. The proof also shows that at the time the schooner was tendered to the libelant, on June 2d, there were no sails or running rigging upon her, and her anchor was a second-hand one and much lighter than her old anchor, which was lost at the time of the disaster, that her center board would not work in the box, and that her yawl or small-boat had been lost in the disaster and had not been replaced. It further appears that on August 30, 1884, the schooner was again tendered to libelant by respondent, but that while another anchor of substantially the weight and usefulness of the one lost had been placed on board of her, she still had no running rigging, nor sails, nor yawl-boat.

The policy in question contains the following clauses, which it becomes material to consider in the light of the facts in the proof:—

"It is agreed that the acts of the insured, or insurer, or its agent, in recovering, saving, and preserving property insured in case of disaster shall not be considered a waiver, or an acceptance of an abandonment, nor as affirming or denying any liability under this policy; but said act shall be considered as done for the benefit of all concerned, and without prejudice to the right of either party.

"Further, the insured shall not have a right to abandon the vessel in any case, unless the amount which the insurer would be liable to pay under an adjustment as of a partial loss shall exceed half the amount insured."

As to the first point made by the defense, I understood at the time of the argument that it was substantially abandoned, as the proof showed without dispute that the insurers were fully advised, at the time this policy was taken out, of the nature of the libellant's interest, and that he intended by such policy to insure the half-interest standing in his name, for the benefit of his brother, James T. Young. Whether said point was abandoned or not, I am well satisfied that it is not well taken, as the authorities all seem to concur in the proposition that the legal title, being wholly in libellant as trustee, he had the right to insure the property so held by him for the use of his beneficiary. As to the second point made by the defense, the contention is that the insured cannot add the cost of repairs to the cost of getting the schooner off the beach, and getting her to a port of safety and repairs, for the purpose of making such an amount as to equal or exceed half the amount insured.

Without going into a discussion of the somewhat technical learning on the subject of the right of abandonment, either at common law or under the old forms of policy, or under what is known as the "Boston clause," it is sufficient to say that it seems to me the only question to be considered for the purpose of settling the right of abandonment under the 50 per cent clause in this policy is the amount of damage which the owner of the insured property received by reason of the disaster sustained by the schooner; and there can be no doubt from the proof that the damages by reason of the disaster in question consisted, first, in the expense of getting the schooner afloat, and getting her to a port of safety and repair, including the care and keeping of the schooner in the interval between the time she was got afloat and the time she reached a port of repair, and the cost of repairing her, so as to put her in as good a condition as she was before the disaster; and the proof abundantly.

shows that, after deducting from the cost of the repairs one-third new for old, and charging to the owner's interest his portion of the salvage expenses, the amount of the salvage expenses and the repairs would equal one-half of the amount insured.

It is argued that the owner should have exercised his right of abandonment at once when he learned of the disaster to the schooner, and that the insurers having, under what is known as the "sue and labor" clause of this policy, simply taken measures to get the vessel afloat and get her to a place of safety and repair, these expenses are to be adjusted as against all interests by a general average, and only the repairs are to be adjusted upon the basis of a partial loss, or particular average; but such course seems to be neither called for by the spirit or letter of this contract of insurance. The purpose and intent of the policy was to make the insured whole for any damage the schooner might receive from any of the perils insured against, and if such damage exceeded 50 per cent of the amount insured, then the right of abandonment is given; and there can be no dispute but what the expense of getting the vessel off and of the necessary repairs, after making all deductions called for by the policy, more than equals 50 per cent of the amount insured. I think the conclusion I have arrived at is fully supported by the opinion of Mr. Justice Matthews in *Wallace vs. Thames & M. Ins. Co.*, 22 Fed. Rep., 66.

It is further urged that the insured is chargeable with unreasonable delay in giving his notice of abandonment,—the disaster to the schooner having occurred in November, and the notice of abandonment not having been given until the seventh of March following; but I do not see under the peculiar facts in this case, how this delay can have worked any injury to the insurer, and if it did not it seems to me it should not in any way impair or affect the rights of the insured in the premises. If the agents of respondent had taken the schooner at once, upon getting her afloat, to a port where she could have been repaired, and where a survey could have been made to determine the cost of such repairs, it might have been the duty of the insured to have exercised his right of abandonment at an earlier time or as soon as an intelligent survey could be made, and the amount of damage by the disaster ascertained; but, inasmuch as the schooner in this case was detained at Northport by the act of the respondent, and against the protest and objection of her master, acting as agent for the owners, so that the insured could not intelligently and fully ascertain the extent of the damage, and the probable

cost of repairs, so as to determine the full extent of the damage by reason of the disaster; and inasmuch as, at the time the notice of abandonment was given, there was still ample time for the respondent to have repaired the schooner, or sold her without repair for the next season's business,—it seems to me it does not lie in the insurer's mouth to object to the delay. It certainly was not the fault of the owner of this schooner that she was kept from a port of repair and out of the possession of her own owner.

What are called "salvage" expenses and the "repair" expenses, when added together, make more than 50 per cent of the amount insured, and this fact seems to me to give the insured the right of abandonment, unless he has lost it by unreasonable delay; and as I do not see that the delay under the circumstances was unreasonable, it appears to me that the right of abandonment was not lost or waived. It also seems quite clear to me that the underwriters have dealt with this property since the disaster in such manner as to make it their own. From the time the wrecking-tug took hold of the schooner to get her off the beach up to the time she was tendered to the libellant and his co-owner on the eleventh of June, 1884, she was continuously in the possession and control of the insurance companies; and when she was tendered on the eleventh of June, she had not been so repaired as to restore her to the condition in which she was immediately prior to the disaster. The right to repair and return the insured property after disaster implied of itself the obligation to return her in as good condition as she was in before the stranding; and yet the proof shows that no sails or running rigging were tendered with her, nor was her anchor or yawl-boat replaced, as they should have been. After the refusal of the libellant to accept the schooner, instead of promptly completing the reparation, respondent retained the schooner, without any apparent excuse, until more than half the season of navigation for that year had gone by, and then made another tender while she was still in an incomplete condition. I think there can be no doubt of the general proposition that where underwriters take possession of insured property under the "sue and labor" clause for the purpose of saving, and, if necessary, repairing the property, they must make reparation and return within a reasonable time, or they make the property their own, and are liable as for a total loss; and, it seems to me, the case is therefore brought clearly, by the facts, within the operation of this principle, and that the insurance companies could not keep this property in their own control for nine months after the disaster

and then compel the owners to take it back, especially in an incomplete condition.

It was urged that the sails and running rigging of this schooner were stored in a sail-loft, and where the owner could readily have obtained them without expense for the purpose of putting them in place ; but it was the duty of the insurers, who had assumed the task of restoring this vessel to her original condition, to have put her in complete sailing trim before they could compel the owners to accept her from their hands. They were not obliged to seek the sails and rigging where they had been stowed and take the expense or delay of putting them in place, but had the right to insist that this should be done by the insurers as part of the repairs. I am, therefore, of the opinion that the libelant makes out by the proof in this case a clear right of recovery as for a constructive total loss; and the finding will therefore be for the amount of the policy, with interest after 60 days from the time proofs of loss were served.

# THE INSURANCE LAW JOURNAL.

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## DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

### ABANDONMENT.

§ 167. MARINE.—*Repairs Subject to General Average in Case of Voluntary Stranding.—What may be Done in Case of.—Effect of Mortgage Held by President of Insurer.*—Repairs to a ship, rendered necessary by a voluntary stranding, are the subject of a general average contribution, and are a charge upon underwriters who have insured the ship against total loss and general average. A ship which had been voluntarily stranded and abandoned to the underwriters, was raised by them and tendered back to the owner without being repaired, and without an offer to pay the expenses of the repairs rendered necessary by the stranding. *Held*, That the owner was under no obligations to receive her, and that the underwriters must be deemed, as a matter of law, to have accepted the abandonment. When an insured vessel is stranded and abandoned, there are three courses open to the underwriters: they may accept the abandonment and pay

for a total loss; they may allow the vessel to lie on the beach and contest the owner's right to abandon; or they may elect to raise and repair her, and if they can do this for less than half her valuation, they may return her to her owner and thus avoid paying a total loss; but in so doing they must act promptly, that the owner may be repossessed of his property without unnecessary delay. A stranded vessel, owned by a corporation, was abandoned to the underwriters by an instrument in writing, signed by the president of the corporation, who, at the same time, held a mortgage upon her in his individual capacity. *Held*, That as he would be estopped to set up the mortgage against the underwriters, the abandonment conveyed to and vested in them "an unincumbered and perfect title to the subject abandoned."

Citting and discussing *Fowler vs. Rathbones*, 12 Wal., 102; *Wallace vs. Ins. Co.*, 22 Fed. Rep., 66; *Copelin vs. Ins. Co.*, 9 Wall., 461; *Peele vs. Suffolk Ins. Co.*, 7 Pick., 254; *Reynolds vs. Ocean Ins. Co.*, 1 Metc., 160; *Norton vs. Lexington Ins. Co.*, 16 Ill., 235; *Younger vs. Gloucester Marine Ins. Co.*, 1 Spr., 236; s. c., 2 Curt., 322; *Provincial Ins. Co. vs. Leduc*, L. R., 6 P. C., 224; *Copeland vs. Ins. Co.*, Wool, 289; *Peele vs. Merchants' Ins. Co.*, 3 Mason, 29; *Marraud vs. Melledge*, 123 Mass., 176; *Herm. Chat. Mortg.*, 355; *Hayes vs. Livingston*, 34 Mich., 387; *Dann vs. Cudney*, 13 Mich., 139; *Truesdail vs. Ward*, 24 Mich., 117; *Meister vs. Birney*, id., 435.

*Northwestern Transp. Co. vs. Continental Ins. Co.*

Rep'd Jour'l, p. 826.

MICH. U. S. C. C.

#### AGENT.

§ 168. FIRE—*When he may Sue.—When Proofs by are Sufficient.—Waiver of Proofs.*—An agent intrusted by his principal with sole management of his business during his absence, has power to bring suit in the name of the principal to recover on a policy in the case of loss by fire.

*Ayres vs. Hartford Ins. Co.*, 17 Iowa, 176; *Farmers' Mutual Insurance Co. vs. Grayville*, 74 Pa. St., 17; *O'Connor vs. Hartford Fire Ins. Co.*, 31 Wis., 160; *Northwestern Ins. Co. vs. Adkinson*, 3 Bush. (Ky.), 328; *Sims vs. State Ins. Co.*, 47 Mo., 54.

In the case of such absence proofs of loss by the agent are sufficient compliance with the requirement that they shall be rendered by the principal, where the latter cannot be found.

When the proofs were so made and returned by the company for amendment, and were amended, and again returned for farther amendment without objection as to lapse of time, this was a waiver of objection that they were made too late.

*German Fire Ins. Co. vs. Grunert.*

Rep'd Jour'l, p. 844.

ILL. S. C.

### ASSIGNMENT.

§ 169. FIRE.—*Soliciting Agent has no Power to Consent to.*—A mere soliciting agent who had never had any connection with the policy had no power to consent to its assignment, although the blank form provided for consent by an agent, and where the policy provided that it should be void if assigned without the company's assent, the agent had no power to bind the company.

*Strickland vs. Council Bluffs Ins. Co.*

Rep'd Jour'l, p. 868.

IOWA S. C.

### BENEVOLENT SOCIETY.

§ 170. LIFE.—*Construction of Certificate as to Heirs and Devisees.*—*When Assessment must be shown.*—The certificate of a benefit society in the clause relating to payment, originally contained a blank space after the words "paid as a benefit to," followed by the words "or in the event of \* \* \* prior death to the legal heirs or devisees of the holders of this certificate." It was filled up by inserting the words "his devisees" in the first hiatus, and the word "their" after "in the event of." The insured left no will. *Held*, That it was not the intention that no claim should arise unless there were devisees under a will. In the absence of a will the benefit would accrue to his legal heirs.

*Distinguishing Morley vs. Aid Association*, 11 INS. L. J. 141.

In order to recover on a certificate which provides that in the event of a claim the association shall levy an assessment and pay over the amount collected, it must be shown that the assessment was levied and the amount collected.

*Smith vs. Covenant Mut. Ben. Association.*

Rep'd Jour'l, p. 861.

WIS. U. S. C. O



## BENEVOLENT SOCIETY.

§ 171. LIFE.—*Nature of.*—*When Failure to Nominate a Beneficiary Causes Lapse in the Benefit.*—*Parol Evidence not Admissible to show Beneficiary.*—Benevolent societies are practically life companies.

May on Ins. (2d ed.), § 550, a, and cases cited; *Smith vs. Bullard*, 61 N. H.; *Dennett vs. Kirk*, 59 N. H., 10; *Commonwealth vs. Wetherbee*, 105 Mass., 149; *State vs. Merchants' Exchange Mutual Benev. Soc.*, 11 Reporter, 163 (Mo., Nov., 1880).

The plaintiff's intestate was a member of the defendant association. The defendant is a corporation chartered "for charitable and benevolent purposes, and for furnishing relief and assistance by means of mutual agreements and payments of funds." His certificate of membership recited that "a sum not exceeding \$2,000, will be paid by the association as a benefit, upon due notice of his death, and the surrender of this certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies." He was in good standing when he died. No person's name was entered on the record book of the association, or on his certificate, showing to whom the benefit should be paid. *Held*, That the plaintiff could not recover. Under such a contract a member has the power merely of appointing the person who shall receive the benefit. He is bound by the rules of the association; and cannot change the beneficiary in a way not in conformity with them. The benefit is not assets which his administrator can recover.

*Ky. Mut. Mas. Ass'n vs. Miller*, 13 Burke, 494; *Worley vs. N. W. Ass'n*, 11 Ins. L. J., 141; *McClure vs. Johnson*, 13 Rep., 13.

Parol evidence is not admissible to show to whom the member intended the benefit to be payable.

*Mason vs. Colburn*, 99 Mass., 342.

*Eastman vs. Provident Mut. Relief Ass'n*.  
Rep'd Jour'l, p. 358.

N. H. S. C.

## MARRIAGE.

§ 172. LIFE. — *Brokerage Contracts Void as Against Public Policy.*—*Court will not Aid in the Absence of Insurable Interest.*—Marriage brokerage contracts are void on grounds of public policy.

All contracts that create a prohibition of marriage are void as against public policy, but conditions in conveyances and legacies imposing a not unreasonable restraint are not void. A provision in the charter of a marriage insurance company which provides that no member shall be entitled to a benefit who marries within three months, and which grants upon marriage a stipulated sum for each previous month that the member was single, is void as operating to restrain marriage. A marriage policy for the benefit of one having no insurable interest in the insured or in his marriage, is void. The law will not aid one who has paid money under such a contract, either in enforcing it or in recovering back what he has paid.

Citing and discussing 2 Lead. Cas. in Eq., 420; *Maddox vs. Maddox*, 11 Grat., 804; *Morley vs. Rennoldson*, 2 Hare, 571; *Williams vs. Cowden*, 13 Mo., 211; 2 Story, Eq. Jur., § 938; *Coppage vs. Alexander*, 38 Am. Dec., 156 (note); *Collier vs. Slaughter*, 20 Ala., 263; *Stackpole vs. Beaumont*, 3 Ves., 89; *Younge vs. Furse*, 8 D. M. & G., 756; *Scott vs. Tyler*, 2 Bro., C. C., 431, 488; *Hartley vs. Rice*, 10 East., 22; *Sterling vs. Sinnickson*, 2 South., 756; *Chalfant vs. Payton*, 91 Ind., 202.

*White vs. Equitable Nuptial Union.*

Rep'd Jour'l, p. 836.

ALA. S. C.

#### MEASURE OF DAMAGES.

§ 173. FIRE.—*Not Restricted by Proofs of Loss in Case of False Representations of Adjuster.*—In an action against a fire insurance company, to recover the amount of a loss, the assured is not limited to the amount claimed in the proof of loss, if he was induced to execute the same through the false representations of the company's adjuster.

Rep'd Jour'l, p. 863.

CAL. S. C.

*Cook vs. Lion F. Ins. Co.*

#### TITLE.

§ 174. FIRE. — *Sole Ownership in Case of Bill of Sale of Personal Property.*—*Evidence as to.*—In determining whether a bill of sale of personal property, based upon a previously existing debt, was absolute, or intended merely as a mortgage, the question to be settled is, whether the intention of the parties was to cancel the debt, or to secure it; this is a question of fact to be determined by the negotiations had at the time, and the sub-

sequent acts of the parties. In determining this question, a person who was present at the time the bill of sale was made, may testify to what he knew of the transaction. At the time of the making of the bill of sale in question, plaintiff's vendor was indebted to him, and was desirous of obtaining more money. He, thereupon, offered to sell him a certain fifteen hundred cords of wood, in payment of the money which was due, and was about to be procured. The bill of sale of the wood was accordingly executed upon such consideration, and the plaintiff immediately took possession, and had it insured in his own name. The application for insurance stated that the plaintiff was the sole owner of the property. Subsequently the plaintiff took another bill of sale for the same wood, from his vendor. At the time of the first bill of sale, it was agreed in writing between the parties, that the plaintiff would sell to his vendor the wood, if, by a certain date, the latter paid him the sum of one thousand eight hundred dollars. *Held*, That the whole contract was an absolute sale, with the privilege to repurchase reserved to the vendee; that the vendee was the sole owner of the wood, and was not guilty of a breach of warranty in representing himself as such in his application for insurance.

Haynie vs. Robertson, 58 Ala., 40, and cases there cited; Hickman vs. Cantrell, 9 Yerger, 172; Magee vs. Catchings, 33 Miss., 673, 693; Hooper vs. Bailey, 28 Miss., 328.

*Cook vs. Lion F. Ins. Co.*

—§ 173.

#### TITLE.

§ 175. FIRE.—*A Lease is Change of Possession.*—A condition in the policy, that any change in possession, without the written assent of the company, shall render the policy void, is broken, if the assured, without obtaining such assent, leases the property assured, and surrenders the possession to another.

*Wenzel vs. Commercial Ins. Co.*

Rep'd Jour'l, p. 809.

CAL. S. C.

#### TORNADO.

§ 176. FIRE.—*Whether Lightning is the Cause of a Tornado a Question of Fact.*—*Preponderance of Evidence in Case of Experts.*—A dwelling insured against lightning was destroyed by a

tornado, and it was claimed that lightning was the efficient cause of the tornado, and therefore the loss. Expert testimony for and against this claim was produced. *Held*, That the question being one of fact for the jury, to be determined chiefly from expert testimony, it was not error to charge that, although the preponderance of evidence is not always to be determined from the number of witnesses, yet where expert testimony must be relied on, other things being equal, the greater number of witnesses of great scientific attainments should carry the greater weight, but that the jury should give such weight to such evidence as they considered that it deserved when taken in connection with all the other evidence.

*Distinguishing Ely vs. Tesch*, 17 Wis., 202; *Bierbach vs. Goodyear Rubber Co.*, 54 Wis., 208; s. c., 11 N. W. Rep., 514.

*Spensley vs. Lancashire Ins. Co.*

Rep'd Jour'l. p. 817

Wis. S. C.

#### WAIVER.

§ 177. FIRE.—*Of Proofs of Loss.—Evidence of.—After Knowledge of Misrepresentation.*—Evidence of waiver of proofs is admissible without specially pleading such waiver. It is not error to instruct the jury that a forfeiture for misrepresentation in the application may be waived by the acts of the company after knowledge of the representation, where the doctrine of waiver is applicable to the case. Where it is desired to introduce evidence impeaching the representations in an application, those representations should first be shown.

*German Fire Ins. Co. vs. Grunert.*

—§ 168.

#### WATCHMAN.

§ 178. FIRE.—*What is not a Compliance with the Policy Condition.*—A breach of any one of the conditions contained in a policy of fire insurance, on the part of the assured, is a good defense to his right of recovery. A policy of insurance, on a quartz mill, contained a condition that "a watchman shall be employed by the assured to guard the premises during such time as the mill is idle." The person claimed to have been employed as a watchman worked in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day; at

night he slept in a house nine hundred feet from the mill, between which house and the mill a hill intervened, which prevented him from seeing the mill. The mill was burned at night, without the knowledge of the so-called watchman. *Held*, That the condition of the policy was not complied with.

*Gladding vs. Ins. Co.*, Cal. S. C., 4 W. C. Rep., 106; *Ripley vs. Ins. Co.*, 30 N. Y., 162.

*Wenzel vs. Commercial Ins. Co.*

—4 175.

#### WIFE'S POLICY.

§ 179. *LIFE.—Effect of Assignment to Creditor on the Rights of Children Beneficiaries.*—F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out, M. was his wife and he had four children living, by a former wife. Subsequently a child was born to F. and M. Afterwards F. and M. transferred their right, title, and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer. On a bill of interpleader brought by the insuring company after the deaths of F. and M.: *Held*, That the policy was an executed, irrevocable, voluntary settlement in favor of the wife and the children in being when it was taken out. *Held*, Further, that F. and M. could pledge or assign the policy to the extent of their interest in it. *Held*, Further, the policy being for \$5,000, that one-fifth of this amount was due to the creditor and one-fifth to each of the four children. *Held*, Further, one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin.

*Ricker vs. Charter Oak Life Ins. Co.*, 37 Minn., 193; *Foster vs. Gile*, 50 Wis., 603; *Baker vs. Young*, 17 Mo., 453.

*Conn. Mut. Life Ins. Co. vs. Baldwin*.

Rep'd Jour'l, 813.

R I. S. O.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME COURT OF CALIFORNIA.

WENZEL

vs.

COMMERCIAL INS. CO. OF CALIFORNIA.\*

- A breach of any one of the conditions contained in a policy of fire insurance, on the part of the assured, is a good defense to his right of recovery.
- A policy of insurance, on a quartz mill, contained a condition that "a watchman shall be employed by the assured to guard the premises during such time as the mill is idle." The person claimed to have been employed as a watchman worked in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day; at night he slept in a house nine hundred feet from the mill, between which house and the mill a hill intervened, which prevented him from seeing the mill. The mill was burned at night, without the knowledge of the so-called watchman. *Held*, That the condition of the policy was not complied with.
- A condition in such policy, that any change in possession, without the written assent of the company, shall render the policy void, is broken, if the assured, without obtaining such assent, leases the property assured, and surrenders the possession to another.

Appeal from a judgment of the superior court of Tuolumne

\* Opinion filed, August 29, 1885. From *West Coast Reporter*.

County, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

R. B. WALLACE, *for the Appellant.*

STREET & STREET, *for the Respondent.*

MORRISON, C. J.

This is an action on a policy of insurance issued by defendant to plaintiff on the seventh day of October, 1881, by the terms of which, in consideration of a certain premium paid the former by the latter, defendant insured the plaintiff, for the term of one year, on his certain quartz mill, situated in the county of Tuolumne, and on other property in the policy enumerated, against loss by fire.

Among the conditions contained in the policy are the following: "It is understood and agreed that a watchman shall be employed by the assured to guard the premises during such time as the mill is idle. \* \* \* Any false representation by the assured of the condition of the property \* \* \* or any overvaluation thereof \* \* \* or any false or fraudulent representation to the authorities touching the property hereby insured \* \* \* or any change in the possession without the written assent of the company, shall render the policy void." These are the important conditions affecting the policy which it is material to consider in this case, and all of which, it is claimed by the company, have been violated and disregarded by the plaintiff. The mill was destroyed by fire on the second of August, 1882, and within the time covered by the policy of insurance.

The company refused to pay the loss incurred, and this action was brought to recover the same of the company. Plaintiff had judgment in the court below. Appellant moved for a new trial, which was denied by the court, and the appeal is from the judgment as well as the order denying the motion for a new trial. At the time of his application for insurance, the plaintiff represented to one Deickman, the agent of the company, that the property covered by the policy was of the value of twelve thousand dollars, and the defendant, believing such representation to be true, insured the property on the basis of a valuation thereof at twelve thousand dollars. This is the fourth finding of the court. The court further finds, in the same finding, "that the property was of no greater value than between eight and nine thousand dollars, but the plaintiff did not intentionally deceive Deickman, the agent of the defendant, but, on the contrary, the plaintiff estimated the property at its cost, which was the sum of twelve thousand dollars." How far did this

false representation of value, although not made fraudulently, affect the validity of the contract? Was it a breach of condition of the policy?

Another important fact in the case appears clearly from the evidence that the insured reported to the authorities in giving in this property for assessment, that its value was only five hundred dollars and on that amount only he paid taxes on the property for the fiscal year 1881 and 1882.

Another point made on behalf of the defense is, that the policy contained a condition to the effect that a watchman should be employed by the insured to guard the premises during such time as the mill should be idle. Was that condition kept and observed by the plaintiff? The sixth finding is, "that during the space of five weeks, immediately prior to the sixteenth day of October, 1881, said quartz mill was continuously in operation crushing ore from the Lynch quartz mine; that, thereafter, said mill was idle until June, 1882; that it was idle from on or about the first day of July, 1882, to the second of August, 1882, at which time said mill was destroyed by fire, and that it was idle at the time of its destruction."

By the thirteenth finding, the court finds that one Lynch was employed to watch and guard the mill, and appellant's counsel makes the point that this is not a finding that Lynch was employed as a watchman on the premises. However this may be, it is apparent from the uncontradicted evidence in the case, that Lynch was not employed as a watchman of the premises, within the sense and meaning of the contract. It appears that Lynch was working in his own mine, twenty-two hundred feet distant from the mill, for six or seven hours during the day, and that at night he slept in a house nine hundred feet from the mill, between which house and the mill, a hill intervened, which prevented this so-called watchman from seeing the mill. The mill was burned and destroyed without waking Lynch, and the first intimation he had of the destruction of the property, was in the morning after the fire. He was too far away from the property during the hours of the night, when it most required watching, to be of any use whatever, as a watchman on the premises. A watchman, according to Webster, is a sentinel, and a watchman of a building is one who takes care of it during the night-time. There are other reasons apparent from the evidence in the case for holding that the conditions of the contract for a watchman on the premises were not kept by the insured, but we have confined ourselves to the undisputed facts of the case.



Another point made by the appellant, is that the condition of the policy in regard to a change in the possession of the property, was broken by the insured. In the ninth finding, it is found by the court, as a fact in the case, that on the seventeenth day of January, 1882, the plaintiff and others, without the consent of the defendant, leased the property insured and surrendered the possession thereof to Joseph Hoskins and his associates. This was a breach of a condition in the policy which rendered the same void according to the express language thereof.

We are of opinion that according to the findings of the court, and the uncontradicted evidence in the case, the plaintiff was not entitled to judgment. A breach of any one of the conditions contained in the policy was a fatal breach on the part of the assured, and a good defense to his right of recovery: Sections 2,607, 2,612, civil code.

We cite the following authorities as bearing on the points decided in the case: *Gladding vs. Ins. Co.*, 4 W. C. Rep, 106; *May on Insurance*, sections 156, 157; *Ripley vs. Ins. Co.*, 30 N. Y., 162; Civil code, section 2,611.

Judgment and order reversed.

SHARPSTEIN, J., concurred.

THORNTON, J. I concur in the judgment.

SUPREME COURT OF RHODE ISLAND.

CONNECTICUT MUT. LIFE INS. CO.)

vs.

CHARLES F. BALDWIN, ADM'R, ET AL.\* )

F. took out a life insurance policy payable to M. and the children of F. When the policy was taken out, M. was his wife and he had four children living, by a former wife. Subsequently a child was born to F. and M. Afterwards F. and M. transferred their right, title, and interest in the policy by an unsealed instrument signed by them, as collateral security for a debt of F., and the instrument and the policy were delivered to the creditor. No question was made as to the validity of the transfer.

On a bill of interpleader brought by the insuring company after the deaths of F. and M.

*Held*, That the policy was an executed, irrevocable, voluntary settlement in favor of the wife and the children in being when it was taken out.

*Held*, Further, that F. and M. could pledge or assign the policy to the extent of their interest in it.

*Held*, Further, the policy being for \$5,000, that one-fifth of this amount was due to the creditor and one fifth to each of the four children.

*Held*, Further, one of the four children having died a minor before F., that the one-fifth due this child should be paid to his legal representative, if any, and if none, to the administrator of F., the child's father and next of kin.

BOSWORTH & CHAMPLIN, *for Complainant.*

ROLLIN MATHEWSON, *for Respondent*, the Fifth National Bank.

CHARLES F. BALDWIN, *for the other Respondents.*

DURFEE, C. J.

This is a bill of interpleader, the object of which is to ascertain the rights of the interpleading parties in the sum of \$5,000, insurance money, payable under a policy on the life of William S. Fifield. The policy was issued by the complainant, a Connecticut corporation,

\* Decision rendered, July 18, 1885. To appear in 15 R. I. Rep.

January 26, 1865. The premiums, which were to be paid in ten years, were all paid by William S. Fifield, the last on January 26, 1874. The agreement of the company was as follows, to wit: "The said company do hereby promise and agree to and with the said assured, his executors, administrators, and assigns, well and truly to pay or cause to be paid, at the city of Hartford, the said sum insured to the said assured, his executors, administrators, and assigns, ninety days after due notice and proof is given of the death of the said William S. Fifield, for the benefit of, and payable to Mary T. Fifield and the children of the said William S. Fifield, deducting therefrom all indebtedness for premiums unpaid at that date." At the time the policy issued, William S. Fifield had a wife, to wit, Mary T. Fifield, named in the policy, and four children by a former wife. On March 17, 1867, a son was born to said William S. and Mary T. Fifield. On March 1, 1875, the said William S. and Mary T. delivered said policy to the Fifth National Bank under the following instrument, namely: "Providence, March 1, 1875. In consideration of the sum of one dollar to us in hand paid, and for other valuable consideration, we hereby assign and set over all our right, title, and interest in policy No. 42,778 in the Connecticut Mutual Life Insurance Company of Hartford, to A. G. Stillwell, cashier of the Fifth National Bank of Providence, R. I." The instrument was signed by William S. and Mary T., but was not under seal. The instrument and policy were delivered as collateral security for an indebtedness of about \$8,000 from William S. to the bank by promissory notes, which were subsequently paid in part by said William S. No consideration moved to the separate estate of Mary T. One of the older children died, July 22, 1877. Mary T. died intestate in August, 1884. William S. died, October 18, 1884.

No question is made in regard to the validity of the contract. The principal question is whether the bank is entitled to all or any part of the insurance money. We see no reason why it was not competent for William S. and Mary T. to pledge or assign the policy to the extent of their interests in it, nor why such pledge was not effected by the delivery of the policy and instrument, however it might have been if only the instrument had been delivered. The question then is, did the pledgors have any interest which passed by the pledge, and if so, what? On the one hand, the contention is that the entire policy passed, and if not, the interest of Mary T. at least. On the other hand the claim is that only the interest of Mary T. could have passed in any event, but that, she having died before

the assured, nothing passed, her interest being contingent on her surviving him. In support of the latter position, the case of the *Connecticut Life Ins. Co. vs. Burroughs*, 34 Conn., 305, is cited. But there the policy was by its terms payable to the wife, or, if she died before the insured, to her children: The interest was clearly contingent. The policy here contained no words of contingency. It is argued that it necessarily imports contingency because it was intended as a family provision. We do not think that is clear. The child that died might have died having children, in which event it could not have been intended that the surviving children of the assured should take all to their exclusion. The policy was expressed to be for the benefit of "Mary T. Fifield and my children." If the policy had been expressed to be for the benefit of "Mary T. Fifield and my four children," we think there can hardly be a doubt that Mary T. and the four children would have taken each a vested fifth, payable at the death of the assured. It is said, in *May on Insurance*, "If the policy when issued expressly designates a person as entitled to receive the insurance money, such designation is conclusive, unless some question arises as to the rights of the creditors of the person who paid the premium and procured the insurance:" *May on Insurance*, § 317. It has been said of a policy similar to the policy here, that the taking of it "was in the nature of an irrevocable and executed voluntary settlement upon the wife and children:" *Ricker vs. Charter Oak Life Ins. Co.*, 37 Minn., 193, 196. We think this is sound law. It follows, it seems to us, that the policy, when issued, vested in the wife and children then in being the \$5,000, to be paid at the death of the assured, i. e., one thousand dollars to each of them. This construction is open to the objection that it excludes the after-born child. Possibly, if the policy had been expressed to be for the benefit of the children only, the doctrine in respect of testamentary bequests to children payable in futuro, namely, that the bequests are payable to them as a class, and that the class will open to let in after-born children to participate in the bequests: 2 *Jarman on Wills*, 5th Am. ed., 704 and note 11. But even if this doctrine of the law of wills can ever be applied to this sort of family provision, we are not prepared to apply it here; for here the beneficiaries are not a single class, the children only, but the wife and the children, for anything we can see, were intended to take *pari passu* with the wife. Construing the policy, then, as an executed and irrevocable voluntary settlement for the benefit of Mary T. Fifield and the children in being when it was issued, the question of what interest passed

to the bank as pledgee is easily answered. The bank as pledgee is entitled to, and only to, the share of Mary T. Fifield, one-fifth of the insurance money, the other four-fifths being distributable as follows, to wit, one-fifth to each of the three surviving children and the remaining fifth to the legal representative of the deceased child, if he has any legal representative; but if, on account of his having died a minor, he has no legal representative, then to the administrator on the estate of William S. Fifield, his father; and next of kin. And see *Foster, Adm'r., vs. Gile, Adm'r.*, 50 Wis., 603; *Baker, Trustee, vs. Young*, 47 Mo., 453.

Decree accordingly.

SUPREME COURT OF WISCONSIN.

*Error to the Circuit Court, Rock County.*

SPENSLEY, ADM'X ETC.,  
 vs.  
 LANCASHIRE INS. CO.\*

A dwelling insured against lightning was destroyed by a tornado, and it was claimed that lightning was the efficient cause of the tornado, and therefore the loss. Expert testimony for and against this claim was produced.

*Held*, That the question being one of fact for the jury to be determined chiefly from expert testimony, it was not error to charge that, although the preponderance of evidence is not always to be determined from the number of witnesses, yet where expert testimony must be relied on, other things being equal, the greater number of witnesses of great scientific attainments should carry the greater weight, but that the jury should give such weight to such evidence as they considered that it deserved when taken in connection with all the other evidence.

The plaintiff's intestate was living and had a dwelling-house in Iowa County, May 28, 1878. On that day it was totally destroyed in a tornado. At the time of the destruction the house and personal property therein were insured against fire or lightning by the defendant. Soon after, this action was commenced upon the policy. On the first trial, which was in Dane County, the plaintiff was nonsuited. The judgment entered thereon was reversed by this court, and the cause was remanded for a new trial. 54 Wis., 433 ; s. c., 11 N. W. Rep., 894 The venue was then changed to Rock County, and the case retried before Judge Bennett and a jury. Seventeen witnesses were sworn and examined on the part of the plaintiff, and

\* Opinion filed, March 3, 1885.

their testimony tended to prove that the motive power of the storm or tornado was electricity or lightning, and two of them, John H. Tice and Elisha Gray, as experts, gave testimony tending to prove that the storm was of electrical origin, and the destruction of the house was due to the effects of lightning or electricity. On the part of the defense, T. C. Chamberlain, W. W. Daniels, John P. Finley, F. A. Smith, C. H. Haskins, C. S. Smith, J. E. Davis, F. E. Nipher, and James C. Watson gave testimony, as experts, tending to prove that the motive power of tornadoes is wind, and that the cause of the destruction of the house was due to the effects of wind, and not lightning or electricity. The learned trial judge, among other things, instructed the jury :—

“ The same rules of law which govern the interpretation and construction of other written contracts and agreements on other subjects, are equally applicable to contracts of insurance, and must govern in their construction and interpretation. And the phrase above quoted from the policy, and the words it contains, are to be construed according to their sense and meaning, as collected from the words themselves and the entire phrase ; and in arriving at their sense and meaning the words themselves are to be understood in their plain, ordinary, and popular sense. In other words, the best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves to the contract viewed it. A result thus obtained is exactly what is obtained from the ordinary rule of intention ; and the word ‘lightning,’ in this policy of insurance, must be understood in its plain, ordinary, and popular sense.

“ It is conceded by both parties to this litigation that the property insured was destroyed in a tornado. But the plaintiff contends that the active agent and real direct cause of its destruction was lightning ; while the defendant contends that the proximate cause of its destruction and loss was violent windstorm, commonly called a ‘tornado,’ and that lightning had nothing to do with it, and that electricity was not the cause of the tornado, and was not an active agent in the ruin and destruction which marked its path through the country. This policy is a general insurance against lightning, and most certainly covers all known effects of electricity coming under the general head of lightning. Webster defines lightning as ‘a discharge of atmospheric electricity, accompanied by a vivid flash of light, commonly from one cloud to another, sometimes from a cloud

to the earth. The sound produced by the electricity in passing rapidly through the atmosphere constitutes thunder.' He also defines ball lightning as a rare form of lightning, seen as a globe of fire moving from the cloud to the earth ; chain lightning is lightning in angular or zig-zag and often forked flashes. And the Imperial Dictionary says that 'lightning is a sudden discharge of electricity from a cloud to the earth, or from the earth to a cloud, or from one cloud to another ; that is, from a body positively charged to one negatively charged, producing a vivid flash of light, and usually a loud report called thunder.' Webster defines a tornado as 'a violent gust of wind, or a tempest, distinguished by a whirling, progressive motion, usually accompanied with severe thunder, lightning, and torrent of rain, and commonly of short duration and small breadth ; a hurricane.' And other dictionaries and encyclopedias give substantially the same definition ; and they tell us that a hurricane is generally accompanied by thunder and lightning, and rain and hail ; and the Imperial Dictionary says that 'they appear to have an electrical origin.' And the Imperial Dictionary defines electricity as 'the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves ; that we are totally ignorant of the nature of the cause, whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtle, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another. Electricity, when accumulated in large quantities, becomes an agent capable of producing the most sudden, violent, and destructive effects, as in thunder storms ; and even in its quiescent state it is extensively concerned in the operations of nature.'

"I have called your attention to the definition of the words 'lightning,' 'electricity,' and 'tornado,' that you may more readily see and arrive at their meaning in their plain, ordinary, and popular sense. The plaintiff alleges that the loss and destruction of the property covered by this policy of insurance, and the consequent damage arising from such loss and destruction, were caused by lightning ; and, this being denied by the defendant, the burden of proof is upon the plaintiff upon this issue, and the plaintiff must show by a preponderance of testimony that such property was destroyed by lightning. I mean, by a preponderance of evidence, that which, after being carefully analyzed and weighed by you, is the most weighty,



satisfactory, and convincing. In other words, the plaintiff must produce on the trial evidence more weighty, satisfactory, and convincing in proof of the fact that this property was destroyed by lightning, than is produced by the defendant to show that it was not.

"In determining the weight and credit to be given to the testimony of the different witnesses in the case, it is proper for you to consider the relationship of any of them to the parties, if the same is proved; their interest, if any, in the event of the suit; their temper, feeling, or bias, if any has been shown; their knowledge, intelligence, and means of information upon the subjects upon which they have been called to give evidence. And where witnesses are otherwise equally credible, and their testimony otherwise equally fair and entitled to credit, greater weight and credit ordinarily are to be given to those whose capacity, intelligence, knowledge, and means of information are greater upon subjects upon which they give evidence.

"The office or function of a witness being to inform the court and jury respecting the facts of any particular case, their opinions are not in general receivable as evidence. The rule is based on the assumption that the tribunal before whom the testimony is given is capable of forming a judgment upon the facts in the case. But there are exceptions to this rule; and on questions of science, skill, trade, and the like, persons conversant with the subject-matter, called by foreign jurists 'experts,'—an expression now naturalized among us,—are permitted to give their opinions in evidence. The reason of this exception to the general rule is that the opinion of witnesses possessing peculiar skill is admissible when the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance; in other words, when it so far partakes of the nature of science as to require a course of previous habit or study in order to the attainment of a knowledge of it.

"It is not always an easy task for the court to determine who are entitled to testify as experts. It is common for physicians to testify as to their opinions relative to diseases and their proper treatment; surgeons, as to the fracture of bones, and whether they have been properly or improperly set; chemists, in the detection of poisons in persons supposed to be murdered, or in determining whether blood-stains are from the bodies of human beings or the blood of animals. So men skilled in the mechanic arts or trades are frequently called upon to give opinions in courts of justice in their peculiar art or

calling. 'Sometimes persons are admitted to testify as experts where the course of study has been so short, or the experience so limited, that the evidence they give is entitled to but very little consideration, and worthy of but very little confidence. While it is the duty of the court in the first instance, when a person is produced as an expert, to pass upon his competency, it is for the jury to say from his evidence whether he has shown such skill in reference to the art or science upon which he gives evidence as to render his opinion of any value. It is under this rule, and its exceptions above noted, that the professors in schools, colleges, and universities, and some skilled in the science of electricity, have been permitted to give their opinions upon the subject of lightning, electricity, whirlwinds, tornadoes,—their causes, manifestations, and effects; and the main question upon which they differ is whether what is commonly called a tornado or whirlwind is caused primarily by lightning, or is due to different currents of wind of various temperatures and barometric pressures.

"The same rules, in the main, which apply to the credit and weight to be given by the jury to the evidence of ordinary witnesses, are equally applicable to the testimony of experts. If they have shown any bias or prejudice, or a desire to sustain any particular theory, regardless of the well known facts of a case as shown by other testimony, or of any theory in opposition to well-established scientific truths, it is proper for you to take such things, and manifestation of feeling or bias, into the account in weighing their evidence. Whether any such bias, prejudice, or desire has been shown, you are the sole judges. Then, again, their preparatory studies—the years of study, experiment, and practice in any art—are matters to be taken into consideration by you in weighing their testimony; their manner, appearance, and demeanor on the stand, and particularly their conduct under cross-examination, generally considered a great test in detection or falsehood; or whether a person testifying as an expert is a mere pretender, or whether he possesses great learning upon the subject upon which he gives evidence, obtained by years of toil and patient, careful, and thorough study. Then, again, you may take into consideration the fact, if you find such to be the case, that these experts have given evidence upon abstract, occult scientific subjects, upon which accurate knowledge is only obtained with very great difficulty; and upon which, from the very nature of the case, the testimony has elements of doubt, uncertainty, or inconclusiveness in it, or some portions of it. But

while infirmity and weakness sometimes attach to the testimony of experts, yet in other cases such evidence is not only highly instructive, but may be such as to be worthy of great weight in settling a scientific fact, or question. And when men of great learning in the main agree upon questions of science or physics, their testimony is entitled to greater credit than it would be if they were in conflict. That although the preponderance of the evidence is not always determined by the number of witnesses, still, in a case where a question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight; that is, the testimony of eight or nine such witnesses would be entitled to greater weight than that of two.

“It must be borne in mind that many of these experts, if not all of them, and I think all of them, have not only given evidence as to matters of opinion as to the cause of the destruction of Spensley’s house, but upon questions of fact relating to lightning, electricity, tornadoes, and whirlwinds; and of them, Prof. Chamberlain saw the tornado itself, though, perhaps, not at the time it struck the house in question. But in this case it is your province to give such weight to the testimony of the experts, when viewed in connection with all the other evidence in the case, as you think and believe it should receive. Has the plaintiff shown, by a preponderance of the evidence in this case, that the building in question and the personal property it contained, insured by the policy given in evidence in this case, were destroyed by lightning? If so, and you so believe and find, from the evidence given on the trial, the plaintiff is entitled to recover. If, on the other hand, you believe and find from the evidence that the insured property was destroyed by a windstorm, and that lightning was not an active agent in its destruction, then the plaintiff is not entitled to recover; for this policy of insurance contains no agreement to pay for property destroyed by wind or a windstorm.

“Evidence has been given on the trial tending to show that electricity is the primary cause of tornadoes. If you should find from the evidence given on the trial that this tornado was itself caused by electricity, but you should at the same time believe and find from the evidence that the property of John Spensley, insured by the policy in evidence, was destroyed by the wind or whirlwind of this tornado thus caused, and not by lightning in its plain, ordinary, and popular sense, the plaintiff would not be entitled to recover. The reason of this is that the law looks to the proximate cause of the in-

jury, and not to the remote cause, and by proximate cause is meant that which immediately preceded and caused the destruction of the property, and not to the remote cause or the predisposing cause. Or, in other language, 'it were infinite for the law to consider the cause of causes and their impulsions, one of another; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree.' But if you find from the evidence in this case that accompanying this tornado or tornado cloud were large quantities of lightning, and that the property insured was in any way or by any means destroyed by such lightning, then, for a loss and destruction thus caused, the plaintiff would be entitled to recover, and to recover for all damages thus sustained, not exceeding the sum of one thousand dollars, with interest at 7 per cent from the twelfth day of September, A. D. 1878."

The court also gave to the jury several instructions at the request of the respective parties, which need not be repeated. The jury returned a special verdict to the effect that the property was not destroyed or damaged by lightning, as understood in its plain, ordinary, and popular sense; that it was not destroyed or damaged by lightning nor fire; and also found generally for the defendant. From the judgment entered thereon the plaintiff brings this writ of error.

CALVERT SPENSLEY, *for Plaintiff in Error.*

MOSES M. STRONG and J. W. LUSK, *for Defendant in Error.*

CASSODAY, J.

The defendant's motion to remit the record and order the trial judge to incorporate the evidence taken into the bill of exceptions is denied, with \$10 costs. As the only errors complained of are found in the charge to the jury, the trial judge very properly denied to incumber the record by making such evidence a part of it. It is difficult to see how the defendant could have been benefited by including it, for unless error appears of record the presumptions are always in favor of the judgment. It is quite common to remit the record to enable the trial judge to correct some mistake or inadvertence; but where it is sought to coerce such judge, he should at least have a hearing as upon mandamus. The view we have taken of the case, however, renders it unnecessary to consider that question. The nature of the case was so fully stated, and the substance of the evidence so fully given in the report of the case on the former appeal (54 Wis., 433; s. c., 11 N. W. Rep., 894), that no repetition

is here deemed necessary. A large portion of the charge upon the last trial is given in the above statement, and hence we shall confine this opinion to the consideration of such portions of the charge as have been criticised by counsel.

It is urged that the trial court gave undue prominence to the expert witnesses, and their testimony in the case. It should be remembered, however, that the fact sought to be proved—the presence or absence of lightning as an agency in the destruction of the property—was incapable of direct, positive testimony, but depended wholly upon the circumstances attending the destruction, and the opinions of experts. It seems to us that the charge, on the whole, fairly presented the nature, value, and weakness incident to expert testimony. Under the ruling of this court, the presence or absence of lightning as an agency in the destruction of the property, was a question of fact for the jury, and hence all must abide their determination, unless material error has intervened. Viewing the charge as indicated, we shall confine what we say to that portion of it upon which counsel for the plaintiff seem to rely most confidently. Exception is taken because the court charged the jury “that although the preponderance of the evidence is not always determined by the number of witnesses, still, in a case where a question is to be determined by the testimony of men of great scientific attainments, other things being equal, the greater number would carry greater weight; that is, the testimony of eight or nine such witnesses would be entitled to greater weight than that of two. \* \* \* But in this case it is your province to give such weight to the testimony of the experts, when viewed in connection with all the other evidence in the case, as you think and believe it should receive.” In support of this objection, counsel rely upon *Ely vs. Tesch*, 17 Wis., 202; *Bierbach vs. Goodyear Rubber Co.*, 54 Wis., 208; s. c., 11 N. W. Rep., 514.

In each of these cases it was held error to instruct the jury, in effect, that where all the witnesses were of equal credit, and those on one side in conflict on a particular question with those on the other, the side having the greater number of such witnesses had the greater weight of evidence upon such question. The vice of such error is stated by Mr. Justice Lyon in the last case cited: “It ignores every condition but that of credibility, whereas, there are other conditions which should be considered in framing a rule on that subject.” Several witnesses may be equally credible, and yet their opportunities for knowing, their capacity for comprehending, their attention to

the facts at the time, and their ability to hold the same in the memory, and many other things, may enter into the weight to be given to their testimony. We do not think the instruction before us is open to that objection. The court was speaking about questions "to be determined by the testimony of men of great scientific attainments," and simply declared the truism that when such men testify on such questions, "other things being equal, the greater number would carry greater weight." By "other things being equal," we understand the court to mean all things being equal in respect to each of such witnesses so testifying. This not only included the credibility of the respective witnesses, but their opportunities, capacities, attention, memory, and every other fact and circumstance in any way going to make up the weight of their testimony. It may be difficult to see just how all such things could be equal as to each of several witnesses ; but what was said about giving the greater weight to the greater number is predicated wholly upon such equality in all things, and whether it did or not exist, was, after all, left to the jury. We find no material error in the record.

The judgment of the circuit court is affirmed.

UNITED STATES CIRCUIT COURT,  
EASTERN DISTRICT, MICHIGAN.

On Motion for a New Trial.

NORTHWESTERN TRANSP. CO. }

vs. }

CONTINENTAL INS. CO. }

Repairs to a ship, rendered necessary by a voluntary stranding, are the subject of a general average contribution, and are a charge upon underwriters who have insured the ship against total loss and general average.

A ship which had been voluntarily stranded and abandoned to the underwriters, was raised by them and tendered back to the owner without being repaired, and without an offer to pay the expense of the repairs rendered necessary by the stranding. *Held*, That the owner was under no obligation to receive her, and that the underwriters must be deemed, as matter of law, to have accepted the abandonment.

When an insured vessel is stranded and abandoned, there are three courses open to the underwriters; they may accept the abandonment and pay for a total loss; they may allow the vessel to lie on the beach and contest the owner's right to abandon; or they may elect to raise and repair her, and if they can do this for less than half her valuation, they may return her to her owner and thus avoid paying a total loss; but in so doing they must act promptly, that the owner may be repossessed of his property without unnecessary delay.

A stranded vessel owned by a corporation was abandoned to the underwriters by an instrument in writing, signed by the president of the corporation, who, at the same time, held a mortgage upon her in his individual capacity. *Held*, That as he would be estopped to set up the mortgage against the underwriters, the abandonment conveyed to and vested in them "an unincumbered and perfect title to the subject abandoned."

This was an action upon a policy of insurance upon the steamer *Manitoba*, whereby the plaintiff was insured in the sum of \$10,000

• Decision rendered, June 8, 1885. From *Federal Reporter*.

against total loss and general average only. On the sixth of November, 1883, the steamer left Port Arthur upon Lake Superior, bound for Sarnia, and in the course of her voyage reached the harbor of Southhampton on Lake Huron, November 11th. The wind was then blowing from the southwest. On arriving at the harbor she bore toward the north breakwater, got out her moorings, and laid alongside of the breakwater. About half-past 5 o'clock the wind suddenly veered to the northwest, and came down in a terrific gale, which increased to a hurricane, and caused the steamer to part her moorings and drift into the harbor. Both her anchors were dropped and the cable of the small anchor parted. The steamer then dragged her large anchor with full scope of chain, and dropped away to leeward, and, with the aid of her engines, was held from going on the beach till about 4 o'clock the next morning, when her large anchor-chain parted. She was then run inside the breakwater, and, to save her from going ashore, the end of her large hawser was gotten out to a snubbing-post, which, however, snapped and was carried away at once. All her lines were then gotten out on her starboard side and made fast to piles, which held the steamer for about an hour and a half, when a terrific blast from the northwest struck her with such force as to part her lines and tear away her starboard side and stanchions from her gang to her stern. To save her from being totally wrecked and lost the steamer was then voluntarily stranded on the inside of Chantry Island.

So fierce was the storm that it threatened to carry the steamer away from the place where she was stranded, and the full force of her engines were needed to keep her from drifting off. The storm continued, with but little intermission, for about eight days. To prevent greater loss and damage to the same from pounding on the gravel bottom, she was scuttled where she was stranded. The place was rocky and dangerous, and she suffered large damages by reason of pounding and rolling upon the rocks and boulders after she was stranded. On or about the thirteenth of November, the passengers, to the number of 16, were removed. The steamer was without cargo, except 160 barrels of salt fish, which had been taken on board at some port on Lake Superior, and which were also removed at the same time, and landed at Southhampton. The steamer was unable to free herself, and the assistance of a wrecking-tug and steam-pumps was required for the purpose. Efforts were made as promptly as possible by the plaintiff to rescue and care for the steamer, and considerable expense was incurred in such undertaking.



The underwriters were immediately notified of the stranding of the steamer, and sent their agent with a wrecking-tug and pumps for the purpose of relieving her. Upon the arrival of the insurance agent, he co-operated with the master of the steamer in the work of attempting to rescue her, and continued his efforts in co-operation with the master and crew of the steamer, until about the thirtieth of November, when he left her, and informed the plaintiff of his intention of leaving her in her then stranded situation until the next spring. The steamer was left there until about the first of June, when she was finally gotten off by the aid of certain tugs, steam-pumps, and pontoons employed by the underwriters, and brought to the port of Detroit, where she was still lying in a wrecked and damaged condition till after the commencement of suit. The steamer was valued in her policies at \$36,000 ; and was insured at the time of her loss in the sum of \$30,850.

The above facts were all stipulated in writing. Upon the trial of the case it was shown that no offer was made by the insurance companies to repair the damages suffered in consequence of the voluntary stranding, or to pay the cost of such repairs, but she was tendered back to the plaintiff in her damaged condition after she had been repaired sufficiently to keep her afloat. On the thirteenth of December, and after the efforts to rescue the steamer that season had ceased, Mr. Beatty, the president of the plaintiff corporation, after protesting against her being left on the beach during the winter, addressed to each of the insurance companies the following letter :

“NORTHWESTERN TRANSPORTATION COMPANY, (LIMITED.)

“SARNIA, December 13, 1881.

“DEAR SIR: The steamer *Manitoba*, of the Northwest Transportation Company, (Limited,) was insured in your company in May last against total loss and general average, fire clause exempted. She had to be beached in the harbor of Southampton during the storm of the eleventh and twelfth of November, or in the morning of the 12th, and still remains there, during which time efforts had been made to take her off but without success. Before Mr. Riordan, your general agent, left for another wreck, he advised me of his intention to leave the steamer *Manitoba* there until spring. To this I gave my distinct refusal, stating that she must be got off this fall, and that I was prepared to pay my proportion of the expense. An offer was obtained from Mr. Murphy, of Detroit, that he would furnish a complete outfit for taking the steamer off for \$500 per day, or \$16,000 under a guaranty to take her off or no pay, which offer was refused by your agent ; and ordered the steamer to be laid up in opposition to my instructions to proceed and take the steamer off.

Regarding her as a wreck, I accordingly abandoned her to the insurance companies' agents, and now notify you that I have abandoned the steamer to you.

Yours truly,

JAMES H. BEATTY,

"Pres. N. W. Trans. Co. (Limited.)"

There was also testimony tending to show that there was a mortgage on this vessel given July 14, 1884, to James H. Beatty, president of the company, which was still outstanding and unpaid, to the amount of about \$70,000, at the time the proofs of loss were served.

The court directed a verdict for the plaintiff for the full amount of the policy, and thereupon defendant moved for a new trial.

MOORE & CANFIELD, *for Plaintiff.*

MAYNARD & SWAN, *for Defendant.*

BROWN, J.

Defendant insured the *Manitoba* against total loss and general average. The stipulation expressly shows that the steamer was voluntarily stranded on Chantry Island to save her from total loss. The liability of the defendant for its proportion of the general average expenses incurred by reason of the stranding was admitted, but it was assumed that such liability was limited to the cost of getting her off, taking her to Detroit, and to such repairs as were necessary to keep her afloat. The insurers having performed this much of their undertaking, she was surveyed and tendered back to her owners. No offer was made to repair the damages occasioned by her stranding, or to pay the cost of such repairs; the company taking the ground that all permanent repairs were a particular average, for which, under their policy, there was no liability. There was no attempt made to separate the damages received before the stranding, which consisted of the loss of "her mooring lines, and the tearing away of her starboard side and stanchions from her gang to her stern," from the much more serious damage she incurred by her being "scuttled, and pounding and rolling upon the rocks and boulders," after she was run ashore.

Repairs rendered necessary by a peril of the sea are ordinarily treated as a particular average, for which the companies would not be liable under a policy of this description; but where a vessel has been voluntarily run ashore to save her from a total loss, we understand that all the damages thereby occasioned, including the expense of repairs as well as of getting her off, are the subject of a general

average contribution. We have considered the case of *Fowler vs. Rathbones*, 12 Wall., 102, as decisive of this point.

The testimony in this case tended strongly to show that the expense of relieving and repairing this steamer would have exceeded 50 per cent of her value, and hence that the insured had the right to abandon her, except so far as such right might be restricted by the particular terms of the policy, providing "that the insured shall not have the right to abandon the vessel, in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured." A similar clause was construed by Mr. Justice Matthews, in *Wallace vs. Thames & Mersey Ins. Co.*, 22 Fed. Rep., 66, to authorize the owners to abandon when the amount of the repairs (less one-third new for old), added to the expense of raising the vessel and taking her to a port of safety, exceeded half her agreed value. This, however, was said in a case where the vessel was accidentally stranded and wrecked by a peril of the sea, and the decision was put upon the ground that the expense of getting her off was not strictly general average. If the same rule were applied to a case of voluntary stranding, the right of the owner in this case to abandon would be clear; but we are inclined to think that this case falls rather within the ruling of *Reynolds vs. Ocean Ins. Co.*, 22 Pick., 197, recognized by Judge Matthews, in which it was held that where a vessel is voluntarily stranded, the expense incurred in getting her off was to be considered as coming within the principle of general average, and to be adjusted as a general average, and not as a partial loss; and hence that the same could not be included in the estimate of damage in determining whether the insured was authorized to abandon.

We do not find it necessary, however, to express a decided opinion upon this point, as the right of the plaintiff to recover as for a total loss was put upon the ground that defendant, by its conduct, was shown to have accepted the abandonment, and is, therefore, precluded from insisting that the circumstances were not such as authorized the plaintiff to abandon. There is no doubt that an underwriter may, by his conduct, make himself liable for a constructive total loss when there is no right to abandon and no intent on his part to accept the abandonment, and even an express refusal to accept it. If he takes possession of the vessel for the purpose of raising, repairing, and returning her to the owner, he is bound to proceed with diligence. Thus, in *Copelin vs. Insurance Co.*, 9 Wall., 461, the underwriter took possession of the vessel to raise

and repair her, but did not tender her back to the owner for more than six months after she was injured, nor make the repairs so thorough as to amount to a complete indemnity. Mr. Justice Strong, speaking for the court, said :—

“In holding longer than was necessary for making repairs, they must be regarded as acting not as insurers, but as owners; for they had no other authority than that of owners for their failure to return within a reasonable time. Their action was, therefore, a substantial recognition and acceptance of the abandonment of which they had been notified, for in no other way had they become owners. On no other theory can this delay be considered lawful.”

See, also, *Peele vs. Suffolk Ins. Co.*, 7 Pick., 254; *Reynolds vs. Ocean Ins. Co.*, 1 Metc., 160; *Norton vs. Lexington Ins. Co.*, 16 Ill., 235; *Younger vs. Gloucester Marine Ins. Co.*, 1 Spr., 236; s. c., 2 Curt., 322; *Provincial Ins. Co. vs. Leduc*, L. R., 6 P. C., 224.

Counsel for defendant distinguished these cases from the one under consideration in the fact that the underwriters took possession of the vessel for the declared purpose of raising and repairing her, before restoring her to the owners, while in this case it is claimed there is no evidence of an intention to repair, the companies undertaking only to raise her, and then tender her back to the plaintiff. But if it be once established that the companies were bound to repair or pay the expense of repairing, the damages occasioned by the voluntary stranding, we think that, having taken possession of the vessel for the purpose of raising her and tendering her to her owners, they were bound to go on and complete their undertaking. As observed by Mr. Justice Miller, in *Copeland vs. Security Ins. Co.*, Wool., 289: “The conditions of these policies, supported by the law, require that the vessel, when tendered, should have been in such a condition that the plaintiff, when receiving her, should have full indemnity for all the injury which was covered by the policy.” In that case the vessel was insufficiently repaired, and it was insisted by the defendant that, inasmuch as the plaintiff did not point out to them the defects, he was bound to receive the boat, make the necessary repairs, and look to a future action at law to re-imburse him the expenses; at all events, that he could not recover the full value of the vessel by refusing to receive her, until he did point out the deficiencies of which he complained, and give the defendant an opportunity to supply them; but the court held the plaintiff justified in refusing to receive the vessel. The claim in this case is substantially the same, viz., that the plaintiff was bound to receive back the

vessel when tendered, and look to an action at law against the company to re-imburse it for the expense of repairs. But if the underwriter may not tender her back imperfectly repaired, may he make such tender after she is gotten off and temporarily repaired? We think not. Having taken possession of her under an obligation to indemnify the owner for the entire loss occasioned by the voluntary stranding, we think the company must be conclusively presumed to have acted with the intention of doing their whole duty in that regard, and that they cannot discharge themselves of any portion of their obligation. Had the stranding been accidental, and the repairs a particular average (and this was evidently the assumption of the companies), the plaintiff might have been bound to take the vessel back; but, under the circumstances, the tender could not be made without at least an offer to pay the cost of such repairs as were rendered necessary by her stranding.

It is true that in the Massachusetts cases the court found that the underwriter took possession with the intention of raising, repairing, and restoring the vessel to the owners, but this intention only became material, if at all, by reason of the clause in the policy that the acts of the insurers in recovering, saving, and preserving the property insured should not of themselves be considered, as it had formerly been, an acceptance of the abandonment; the courts adding the proviso that due diligence be used in this connection. A reference to the cases in the order of their date is instructive as showing the origin of the clause in question. The earliest cases arose out of the wreck of the *Argonau*, in March, 1821. In this case the ship went upon the rocks, suffered much damage, and was abandoned to the insurers. The companies caused the vessel to be taken from the rocks, and, having made certain repairs on her, offered to restore her to the plaintiffs. The plaintiffs contended that the vessel had not been sufficiently repaired, nor within a reasonable time, and the expense of the repairs would exceed 50 per cent of her value. One of the companies was sued by libel on the admiralty side of the district court of Massachusetts; another was sued in the State court. In the first case (*Peele vs. Merchants' Ins. Co.*, 3 Mason, 27), Mr. Justice Story held—First, that the owners had the right to abandon under the circumstances, even if the injury was less than half the value. Second, that in estimating the half value there was not to be a deduction of one-third new for old, as in case of partial loss; that the half value which authorized an abandonment was half the sum which the ship, if repaired, would be worth, after repairs made. Third, that the un-

derwriters had no right to take possession of the ship, either to move her or to repair her, without the consent of the owners; that these acts of taking possession, etc., after the abandonment, were, in point of law, an acceptance of the abandonment, since the underwriters could not be justified in them, except as owners of the property. In the other case (*Peele vs. Suffolk Ins. Co.*, 7 Pick., 254), against another company, the Supreme Court of Massachusetts held that the underwriter might take possession of the ship, and repair her, and if the repairs were made for less than half the value, might restore her to the assured; but unless the repairs were made within a reasonable time, the insurer forfeited his right to return her and should be considered as having accepted the abandonment.

In consequence of the decision of Mr. Justice Story, the policies were amended so as to provide that the acts of the insured or insurers in recovering, saving, and preserving the property should not be considered a waiver or acceptance of the abandonment; and that the insured should not have the right to abandon in any case, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, should exceed half the amount insured. The effect of the first amendment was considered by Mr. Justice Shaw in the case of *Reynolds vs. Ocean Ins. Co.*, which was twice before the Supreme Court of Massachusetts, reported in 22 Pick., 191, and 1 Metc., 160. It was argued in this case that whether the acts done by the insurers towards saving the property were done promptly and actively, or tardily and negligently, could make no difference; and that, whatever was the character of such acts, they were protected by the policy from being regarded as evidence of an acceptance of the abandonment. "Supposing this view to be correct, still taking possession of the vessel for another and distinct purpose, is not within this provision in the policy. The act is qualified by the intent and purpose with which it is done. If done solely with a view to save the property, the underwriters were at liberty to do such acts or not as they should see fit, and do them in their own time. If done with the intent to repair and restore the vessel, then it was to be done with reasonable diligence and dispatch, on peril of making the vessel their own, by taking her into custody." The learned judge here appears to make a distinction between acts done with the view simply to save the property, and similar acts done with the view, not only of saving the property, but of restoring it to the owners. The language used in this opinion is not entirely clear. There could be no other purpose in getting the vessel off except "to

save the property." If done to save the property for themselves, and the property is actually taken by the underwriters, they would undoubtedly be held to have accepted the abandonment. If done to save it for the owner, they are equally liable, unless they proceed with diligence. In this view we find it difficult to perceive how the intent with which the act is done can be decisive of the rights of the parties. We should say that they would depend rather upon what was actually done than upon the intent with which it was done.

The whole law upon the subject may be summed up as follows: When an insured vessel is stranded and abandoned there are three courses open to the underwriters: They may accept the abandonment and pay for a total loss; they may allow the vessel to lie on the beach, and insist that there was no right to abandon; or they may elect to raise and repair her (if bound to repair), and if they can do this for less than half her valuation, they may return her to the owners and thus avoid paying for a total loss; but in so doing they must act promptly, that the owners may be repossessed of their property without unnecessary delay. *Marmaud vs Melledge*, 123 Mass., 176.

The object of the clause in the policy was to prevent the mere act of taking possession and rescuing the property being treated as, *ipso facto*, an acceptance of the abandonment. The companies wished to reserve the right to raise, repair, and restore the vessel within a reasonable time. But in the *Peele* case it was held that they were not at liberty to touch her in any way without being held as accepting the abandonment. The policies now not only give them the right to interpose to recover the vessel, but in case the owner should do this, and then refuse to repair, the underwriters may then, after recovery, cause the same to be repaired for account of the insured; but, having once made their election to raise the vessel, we do not understand that they are at liberty to stop short of full performance, or to tender her back to the owners without complete indemnity for the loss. In this view of the law, as the facts herein stated were undisputed, there was no question for the jury, and they were properly instructed to return a verdict for the plaintiff. *Peele vs. Merchants' Ins. Co.*, 3 Mason, 27.

Certain exceptions were taken to the form of the abandonment, which, we think, are untenable. The policy requires the abandonment to be in writing, signed by the insured, and delivered to the company; and that it shall be efficient, if accepted, to convey to and vest in the insurers an unincumbered and perfect title to the subject abandoned. The abandonment in this case is contained in the letter

of December 13th, signed by the president of the plaintiff corporation. Under the circumstances, we think this act was within the scope of his authority, and that his signature as president indicates sufficiently that it was the act of the corporation. It is true, the president held a mortgage upon the steamer, in his individual capacity, and that the title of the plaintiff was incumbered to the extent of this mortgage at the time the abandonment was made; but we think that Mr. Beatty, in signing the abandonment as president, would be estopped to set up his individual mortgage against the insurance company. *Herm. Chat. Mortg.*, 355; *Hayes vs. Livingston*, 34 Mich., 387; *Dann vs. Cudney*, 13 Mich., 139; *Truesdail vs. Ward*, 24 Mich., 117; *Meister vs. Birney*, *id.*, 435.

The motion for a new trial must be denied.



## SUPREME COURT OF ALABAMA.

DECEMBER TERM, 1884.

WHITE

vs.

EQUITABLE NUPTIAL BENEFIT UNION. }

Marriage brokerage contracts are void on grounds of public policy.

All contracts that create a prohibition of marriage are void as against public policy, but conditions in conveyances and legacies imposing a not unreasonable restraint are not void.

A provision in the charter of a marriage insurance company which provides that no member shall be entitled to a benefit who marries within three months and which grants upon marriage a stipulated sum for each previous month that the member was single, is void as operating to restrain marriage.

A marriage policy for the benefit of one having no insurable interest in the insured or in his marriage is void.

The law will not aid one who has paid money under such a contract, either in enforcing or in recovering back what he has paid.

CLOPTON, J.

The special counts of the complaint declare on a contract, called a "marriage insurance policy," issued by the Equitable Nuptial Benefit Union, which is averred to be a corporation, duly incorporated under the laws of this State. The question of the validity of the contract was made by demurrer to the special counts; the causes assigned being, that it is in the nature of a marriage brokerage contract; is in restraint of marriage; and is in the nature of a gambling contract.

A marriage brokerage contract is an agreement for the payment of money, or other compensation, for the procurement of a marriage.

Although they may not be a fraud on either party, such contracts are held to be void, and a public mischief, for as much as they are calculated to bring to pass mistaken and unhappy marriages, to countervail parental influence in the training and education of children, and to tempt the exercise of an undue and pernicious influence, for selfish gain, in respect to the most sacred of human relations. An essential element in such contract is, the procurement of a marriage oftentimes without regard to the wishes of friends or parents, or to the happiness of the parties most deeply interested. There is no such element in the contract sued on; nor is there anything in its nature that contemplates compensation for the negotiation or procurement of any particular marriage. By the contract, it is agreed to pay an amount of money upon the contingency of marriage, but leave the party in the exercise of entire freedom as to the person with whom he may propose to contract marriage. While in view of the conclusion at which we have arrived, it is unnecessary to decide this question, we have said this much, it being presented by the record, to exclude any inference that in our opinion the contract is obnoxious to this objection.

Without extending this opinion by an unnecessary attempt to consider the different and variant applications of the rules determining the illegality of contracts, and of conditions annexed to gifts or testamentary dispositions in restraint of marriage; we shall refer to those rules that have been generally accepted and recognized. Subject to modifications and limitations by the application of other special rules, dependent upon the facts, whether the condition be precedent or subsequent, or whether there is a gift over, or whether the property be real or personal, all conditions in deeds or wills, and all contracts, executory or executed, that create a general prohibition of marriage, are contrary to public policy, and to "the common weal and good order of society." The rule rests upon the proposition that the institution of marriage is the fundamental support of national and social life, and the promoter of individual and public morality and virtue; and that to secure well-assorted marriages, there must exist the utmost freedom of choice. Neither is it necessary there shall be positive prohibition. If the condition is of such nature and rigidity in its requirements as to operate a probable prohibition, it is void.

On the other hand, conditions in conveyances, or annexed to legacies and devises, in partial restraint of marriage, in respect to time,

or place, or person, if reasonable in themselves, and do not virtually and practically create an undue restraint upon the freedom of choice, are not void. Says Judge Story: "But the same principles of public policy which annul such conditions when they tend to a general restraint of marriage, will confirm and support them when they merely preserve such reasonable and prudent regulations and sureties as tend to protect the individual from those melancholy consequences to which an over-hasty, rash, or precipitate match would probably lead." 1 Story Eq. Jur., § 281.

The want of harmony in the adjudged cases does not arise from any ambiguity in the rule itself, but from its comprehensive terms, inasmuch as the application of the rule to the facts of each particular case is submitted to the sound discretion and judgment of the court. The courts applied it, according to their estimation of the relative necessity and importance of preserving the largest liberty in the formation of marital alliances on the one hand, and, on the other, of upholding the prerogative of the dispenser of bounty to dictate the terms upon which its enjoyment shall commence or continue, and of the right of persons competent to contract to fix the terms of their agreement, so far as may be consistent with the public weal. 2 Lead. Cas. in Eq., 420; *Maddox vs. Maddox*, 11 Grat., 804; *Morley vs. Rennoldson*, 2 Hare, 571; *Williams vs. Cowden*, 13 Mo., 211; 2 Story, Eq. Jur., § 933; *Coppage vs. Alexander*, 38 Am. Dec., 156 (note). Under the operation of this rule, conditions restraining marriage without consent of parents, guardians, or executors, or under twenty-one, or other reasonable age, or with particular persons, are held to be valid; and conditions not to marry a man of a particular profession, or that lives in a named town or county, or who is not seized of an estate in fee, are held to be too general, and void. *Collier vs. Slaughter*, 20 Ala., 263; *Stackpole vs. Beaumont*, 3 Ves., 89; *Younge vs. Furse*, 8 D. M. & G., 756; *Scott vs. Tyler*, 2 Bro., C. C. 431, 488.

It is true, these instances of the application of the rule are, in cases of conditions, annexed to gifts, devises or legacies; but illustrate that the condition will be sustained, when it is in the exercise of due and reasonable precaution against rash or improvident marriages. But if it is an evasion of the law, or a cover to restrain marriage generally, or is in terrorem, the condition will be declared void. The present is the case of a contract, and these illustrations are helpful only to the extent that contracts in restraint of marriage are dependent upon the same principles.

The charter of "the Equitable Nuptial Benefit Union" declares "the object of the association is to unite acceptable young people in such a way as to endow each with a sum of money, not to exceed six thousand dollars, to be paid at marriage as endowments, according to the regulations adopted." It proposed to accomplish this ostensibly laudable object by the issuance of certificates of membership. The one issued in this case contains, among others, the following provisions:—

"No member will be entitled to any benefit whatever, who marries in less time than three months from the date of his certificate. Every member who shall have been in good standing as a member for at least three months prior to his marriage, shall be entitled to forty dollars per month upon each one thousand dollars named in his certificate, for each whole month of his membership, provided that the sum shall never exceed three thousand dollars, or so much thereof as shall be realized from one marriage assessment on all the members of this class."

The restraint of marriage is partial. The counsel for plaintiff insist that the restraint is reasonable, not forbidding marriage, but postponing it, with the consent of the applicant for membership, to a period when it can presumably be made to greater advantage; and therefore should be held valid, by analogy to similar provisions in gifts or testamentary dispositions. No circumstances are proved to show the reasonableness of the restraint. This must be ascertained from the certificates of membership, without the aid of extrinsic and surrounding facts and circumstances. Looking at the certificate, we are forced to the conclusion, that the restraint of marriage for three months is, not for the benefit or advantage of the applicant, but to enable the association to realize a benefit fund, and to keep the applicant in a condition to contribute thereto, by the payment of dues and assessments.

In *Hartley vs. Rice*, 10 East., 22, Lord Ellenborough, C. J., says: "On the face of the contract its immediate tendency is, as far as it goes, to discourage marriage; and we have no scales to weigh the degree of effect it would have on the human mind. It is said, however, that the restraint is not to operate for an indefinite period, but only for six years, and that there might be reasonable grounds to restrain the party for that period. But no circumstances are stated to us to show that the restraint was reasonable; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract." And in *Sterling vs. Sinnickson*, 2 South., 756,

where the action was on a sealed bill to pay one thousand dollars, provided the obligee was not lawfully married in six months, Kirkpatrick, C. J., after stating the general principle that all obligations restraining marriage generally, are void, says: "And I find no case but in that of legacies (with one exception of a gift), that gives validity to an instrument when made in contradiction to the principle first mentioned. And the principle of time, place, and person appears to apply to legacies only, unless for a good consideration."

It is not stated that there existed any relation between the applicant and the plaintiff, or the association, that would or could have moved either the plaintiff or the association, to impose the restraint from prudential motives in favor of the applicant. A person, having an interest arising from relationship or close friendship, may, by conditions or partial restraint in gifts or legacies, guard and protect inexperienced youth against rash and improvident marriages; and the husband may restrain his widow in the interest of his children, but, as is added in some of the cases, "this could not be done by a stranger."

In *Chalfant vs. Payton*, 91 Ind., 202, a certificate of membership, issued by "the Immediate Marriage Benefit Association," was held to be contrary to public policy, and illegal—the contract being to pay a sum of money on condition that the member does not marry within two years, and on marriage thereafter to pay a certain sum per day during the time he shall remain unmarried. It may be said that the time of restraint by the contract sued on, is for a much shorter period. By what rule, in the absence of special facts and circumstances, can the reasonableness of the time of restraint be measured? By what scales can the degree of its effect upon the mind of the applicant be weighed? Where a parent restrains the marriage of a child, or a friend prohibits it, the restraint, without the consent of parents or guardian, until an age at which the child is competent to contract without such consent, does not violate, but is in furtherance of the policy of the law. But when a stranger, without any interest or motive, except for selfish gain, enters into a contract restraining the marriage of another for a definite period of time, the contract, *pro tanto*, violates public policy.

If there were no provision other than the restraint for three months, a doubt as to its illegality might reasonably be entertained; but the restraint for three months is not the full scope of the contract. To obtain a clear comprehension of its nature and tendency, another provision must be observed. The certificate not

only makes the payment of the money conditioned on not marrying in less than three months, but provides that upon marriage after the expiration of three months, the member shall be entitled to receive forty dollars on each one thousand dollars named in the certificate, for each whole month of his membership; that is during the time he remains single. Thus the contract contains an inducement to postpone marriage indefinitely, although the member contemplates its consummation at some future uncertain time; for the longer the marriage is postponed, the larger is the sum to be paid. The amount which the member will be entitled to receive is conditioned on the length of time marriage is deferred. This inducement, in connection with the restraint for three months, may have the effect to operate an indefinite postponement; and, as there is no limit, within which the member shall marry, it may operate a general restraint.

Insurance, being an indemnity against loss or risk, is not intended for the benefit of persons having no concern in the subject-matter, nor any interest in the event. In *Helmetag vs. Miller*, it is said: "No principle of the law of life insurance is, at this day, better settled than the doctrine, that a policy, taken out by one person upon the life of another, in which he has no insurable interest, is illegal and void, as repugnant to public policy. \* \* \* Such contracts are aptly termed wager policies, and are entitled to no higher dignity in the eye of the law than gambling speculations or idle bets as to the probable duration of human life." The same principle, that where there is no insurable interest the policy is invalid, pervades the law of all kinds of insurance. At an early period, marine insurance policies, without interest, were considered as innocent wagers; but now, such policies are held to be void, as contravening the cardinal object of insurance,—indemnity against loss,—and as being dangerous and demoralizing by tempting the insured, having nothing to lose but everything to gain, to bring to pass the event, upon the happening of which the insurance becomes payable, *May on Ins.*, 875. Although the certificate is not properly a policy of insurance, an application of these principles will enable us to arrive at a satisfactory conclusion as to the character of the contract, when considered in the light of the attendant circumstances.

Vandeventer, at the time of making the application, in response to questions propounded, named the plaintiff as the person, to whom the benefit should be paid, and to whom notices of dues and assessments should be sent for payment. There was also an

agreement that plaintiff would pay all dues and assessments, which he did, and Vandeventer should receive one-third of the proceeds of the certificate when collected, after deducting expenses. It is manifest that, while Vandeventer made the application personally, and is the nominal member, he was the mere instrument to procure the certificate, and that the contract was made ready for the benefit of the plaintiff. It must be regarded as virtually and substantially a contract with him.

The plaintiff, not being related to Vandeventer by affinity or consanguinity, and having no business relations with him whatever, had no personal interest in his marital relations. It was speculation on the part of the plaintiff, without interest, upon the probability of Vandeventer's marriage,—as the plaintiff tersely characterized it in his testimony, “a speculation in marriage futures.” Such contract is disfavored and disapproved by the law in the interest of the common weal, of good order and general public policy. It subjects the plaintiff to a temptation, for pecuniary advantage, to promote and procure the marriage of Vandeventer, at some future period, by which the plaintiff has nothing to lose. Upon analogous principles in cases of insurance, such contract is, in its nature, a wager contract. *Chalfant vs. Payton*, supra.

It is further contended, that if the contract is illegal, the plaintiff is entitled to recover, under the common courts the sum of the dues and assessments paid by him especially from Hundley, by virtue of a special promise. The action was commenced originally by process of attachment against three named individuals, among whom is Hundley, who are described in the affidavit preceding the issue of the writ, as “constituting the Equitable Nuptial Benefit Union, organized under the laws of Alabama.” In the margin of the complaint, subsequently filed, the parties are stated in the same manner; but the body complaint reads: “The plaintiff, Alexander L. White, claims of the defendant, the Equitable Nuptial Benefit Union, a corporation composed of the defendants, Oscar R. Hundley, William A. McNeely and Alexander Erskine, Jr., and duly incorporated under the laws of Alabama.” The individuals named in the margin as defendants, are mentioned in the body of the complaint, which controls the marginal statement, merely as composing the alleged corporation—*descriptio personarum*. Filing such complaint, and going to trial thereon, operated a discontinuance of the suit against them as individuals, and converted it into an action against the corporation as the sole defendant.

The court will not lend its aid to either party for the enforcement of an illegal, executory contract, in an action to recover for its non-execution; and, where a contract contravening good morals or public policy has been fully and voluntarily executed, and the parties are in *pari delicto*, the court will not interfere with the acquired rights of either at the instances of the other. *Hill vs. Freeman*, 73 Ala., 200. The claim of the plaintiff to recover the dues and assessments paid falls within this rule.

**Affirmed.**



## SUPREME COURT OF ILLINOIS.

*Appeal from the Appellate Court from the Second District.—Originally  
Appealed from the Circuit Court, Peoria County, Ill.*

GERMAN FIRE INS. CO. OF PEORIA }

vs. }

WILLIAM GRUNERT.

An agent entrusted by his principal with sole management of his business during his absence, has power to bring suit in the name of the principal to recover on a policy in the case of loss by fire.

In the case of such absence proofs of loss by the agent are sufficient compliance with the requirement that they shall be rendered by the principal where the latter cannot be found.

When the proofs were so made and returned by the company for amendment, and were amended, and again returned for farther amendment without objection as to lapse of time, this was a waiver of objection that they were made too late.

Evidence of waiver of proofs is admissible without specially pleading such waiver.

It is not error to instruct the jury that a forfeiture for misrepresentation in the application may be waived by the acts of the company after knowledge of the representation, where the doctrine of waiver is applicable to the case.

Where it is desired to introduce evidence impeaching the representations in an application, those representations should first be shown.

SCHOLFIELD, J.

This is assumpsit on a policy of insurance issued by the German Fire Insurance Company of Peoria, to William Grunert, on a stock of groceries in Winchester, to recover for a loss which occurred by fire on the 8th of September, 1880.

A question in limine is, whether there is error in the ruling of the

circuit court on a motion made by defendant to dismiss the action, on the ground that it was not brought by the plaintiff, but, on the contrary, was being prosecuted without his knowledge or authority. The motion was supported by an affidavit of defendant's secretary, and an affidavit of Ernest Grunert, general agent of the plaintiff, was read in opposition to the motion. The court overruled the motion. We think this ruling was correct. The principal being out of the country, the general authority with which the agent was invested necessarily included authority to bring the suit. He had the sole management of the business; and authority to bring necessary suits to collect, and for insurance, in case of loss by fire, is indispensably incident to his general power, and essential to an efficient discharge of his duties.

The policy contains a clause requiring that the assured "shall forthwith give notice of any loss to the secretary of the company, and within thirty days after such loss shall deliver at the office of the company in Peoria, either personally, by agent, mail or express, a particular account of such loss, signed and sworn to by him, naming each article, and the cash value thereof," etc. The defendant among other things pleaded that the assured did not, within thirty days after the loss complained of, or at any other time, deliver to the defendant such proof of loss, signed and sworn to by him. Upon the trial it was proved, on behalf of the plaintiff, that in the month of January or February, 1880, the plaintiff left Winchester for St. Louis, for the purpose of purchasing goods; that before leaving Winchester he put his brother, Ernest Grunert, in charge of his store and business, as clerk and agent, and that said Ernest Grunert thenceforth continued to act in that capacity until the stock was destroyed by fire on the 8th of September, 1880, and since then he has continued to act as business agent for the plaintiff; that the plaintiff never returned to Winchester from such trip, and his said agent has never been able to learn anything of him since his departure from Winchester on that trip.

The court, on behalf of the plaintiff, and over objections of the defendant, admitted in evidence certain proofs of loss, signed and sworn to by Ernest Grunert, clerk of William Grunert, and also thereupon instructed the jury as follows:—

"The court instructs the jury, that if you believe from the evidence, that William Grunert, the insured, was, at the time of the fire, September 8th, 1880, absent from his home in Winchester, Illinois, and could not be found, so as to make proofs of the loss within

the time specified by the policy, then, in that case, such proofs of loss could be made by the agent of the said William Grunert."

It is contended on behalf of the defendant, that the court erred in admitting this evidence and in thus instructing the jury. The ruling is sustained by authority, and is unobjectionable. If it should be held incorrect, it is plain upon no additional attainable evidence can there be a recovery on the policy, although in every other respect the evidence might be ample to maintain a recovery, for the signature and affidavit of the plaintiff to the proofs of loss were not and cannot be obtained. It is said in *Wood on Fire Insurance*, p. 693, sec. 413: "Proofs of loss should be made as required by the policy, both as to substance and time, or a legal excuse shown therefor. They should be made either by the assured, his agent, or party in interest. If the assured does not make the proofs, a valid reason therefor should be shown; and it is sufficient to show that he is non-resident, dead, or was absent or insane at the time when the loss occurred and did not return in time to make the proofs." See, also, cited in support of the text, *Ayres vs. Hartford Ins. Co.*, 17 Iowa, 176; *Farmers' Mutual Insurance Co., vs. Grayville*, 74 Pa. St., 17; *O'Connor vs. Hartford Fire Ins. Co.*, 31 Wis., 160; *Northwestern Ins. Co. vs. Adkinson*, 3 Bush. (Ky.), 328; *Sims vs. State Ins. Co.*, 47 Mo., 54. The absence of the plaintiff, here, brings the case within the exception.

An objection is also urged on the ground that the signature and jurat to the proofs of loss are insufficient, in that they show a signature of William Grunert, "per Ernest Grunert, clerk and agent," and that Ernest Grunert, for William Grunert, makes oath to the proof of the proofs. The objection is hypercritical. It very clearly appears that Ernest Grunert, agent for William Grunert, signs and swears to the proofs, and this is sufficient.

The court also, at the further instance of the plaintiff, instructed the jury: "If you find, from the evidence, that the defendant insurance company issued to the plaintiff the policy mentioned in the declaration in this case, and that while said policy of insurance was in full force and effect a portion of the property mentioned in and insured by said policy was, on September 8, 1880, destroyed by fire, while the same was the property of the plaintiff, and without the fault of the plaintiff, and that the plaintiff was absent at the time of such loss, and unable to make proof of the same, and that the agent of the plaintiff, who in the plaintiff's absence had full charge, management, and control of plaintiff's

business, and who had possession of the property insured by said policy, as such agent in the absence of the plaintiff, made out and delivered to the defendant insurance company on or before September 23, 1880, a written notice and proofs of loss, and that on September 23, 1880, the defendant returned such notice and proofs of loss, with objections thereto, and that such notice and proofs of loss were again amended by the same agent of the plaintiff, and again delivered to said defendant, and that the defendant returned the same on the 8th day of October, 1880, and that said notice and proofs of loss were again amended by the same agent of the plaintiff, so that the same substantially complied with the conditions of said policy, and delivered the same to said defendant insurance company, and that on October 26, 1880, said defendant again returned said notice and proofs of loss, with objections thereto, and that said defendant, at none of the times it returned said notice and proofs of loss, objected that the plaintiff had not made out and delivered such notice and proofs of loss within the time mentioned and provided in said policy, that said defendant insurance company thereby waived all objections that said notice and proofs of loss were not delivered to said defendant within the time provided for in said policy; and if you further find, from the evidence, that the plaintiff complied with all the other conditions of said policy, then you should find for the plaintiff."

It is contended there was error in the giving of the instruction—firstly, for the same reason that was urged against the first instruction, and which we have just considered; secondly, because it does not tell the jury they must believe, from the evidence, that the agent was properly qualified to make the proofs of loss; thirdly, because of the confusion of dates as to when the proofs were sent and returned, as shown by the evidence; and fourthly, because it is directly put in issue by one of the special pleas whether the plaintiff did or did not furnish proofs of loss to the defendant, at his office, within the time required by the policy, and the plaintiff did not to that plead that the defendant had waived such proofs.

The instruction must have been understood by the jury, as relating to the character of agent which the evidence before them showed Ernest Grunert to be,—an agent, the principal being absent, having full charge, management, and control of this business (that of a retail grocer), and possession of property. This is the language of the instruction, and no one could be misled by it. Such an agent must necessarily possess and exercise the same power and authority

in the business that the principal could, were he present; for, were it otherwise, the business, however well conducted, must soon terminate for lack of funds. The destruction by fire of the stock would destroy and terminate the agency. A general business, unlimited by special terms, would not thus terminate, and a general agency, until revoked, would be co-extensive, in scope and duration, with the business. There is a slight mistake in one or more of the dates of the proofs of loss, but this is unimportant, and could not, in our opinion, have misled. Their dates, in that connection, are not of material consequence.

As to the plea that the plaintiff did not furnish proofs of loss, etc., it might, undoubtedly, have been replied that such proof was waived, etc.; but it was not indispensable that it should have been so replied, to authorize admission of the proof of waiver. The doctrine of waiver, in this connection is, in substance and effect, that of estoppels in pais (May on Insurance, sec. 405), and estoppels in pais, at common law, need not, although they might be pleaded specially. Biglow on Estoppel—1st. ed., 590; 2 Smith's leading cases, Doe vs. Oliver, Duchess of Kingston's case, 7th Am. ed., 658. Here the evidence that plaintiff did not furnish proofs of loss within time, etc., is rebutted and overcome by evidence that such proofs were waived,—i. e., in legal effect the fact was admitted, and the proofs dispensed with. The estoppel assumes that the plea is not sustained, and precludes further evidence. The legal conclusion is, the proofs were furnished within time, etc.; and this result from the evidence of waiver, a fact or facts constituting an estoppel in pais.

The sixth instruction, given at the instance of the plaintiff, informs the jury that if they believe, from the evidence, that the defendant knew that any misrepresentations had been made by the assured in his application for a policy of insurance herein sued upon, and after the knowledge of that fact demanded of plaintiff that he make and deliver proofs of loss from the fire, then, in that case, as matter of law the defendant will be presumed to have waived any defense it may have had by reason of said misrepresentations. Two objections are urged against this instruction: First, it is contended there is no evidence on which to base it; and second, that under the issue no question of waiver is involved. This second objection is answered in what has been said with reference to the last objection to the second instruction. The first objection we think not well taken. There was some evidence—how much it not our province to discuss, on which to base it.

The defendant asked the court to instruct the jury: "The jury are instructed that the plaintiff in this suit is bound by the terms and conditions of the policy of insurance introduced in evidence, so far as the same relate to him, and that by the terms of the policy the application of the plaintiff for insurance which has been introduced in evidence, became by the terms and conditions of the policy, a part of the policy and contract of insurance and warranty by the plaintiff that any false over-valuation of property, or any misrepresentation whatever in said written application or otherwise, should render the policy void and of no effect; and if you believe, from the evidence, that in said application the plaintiff falsely misrepresented the value of this property covered by the policy, with intent to deceive defendant, then you will find a verdict for the defendant."

The court refused to give the instruction as asked, but modified it by adding: "Unless you further believe from the evidence, under the law as explained in these instructions, that defendant had waived its right to have the policy forfeited on that ground." This modification counsel insists was erroneous, because specific reference is not made to the explanations in other instructions. We cannot think the jury could have been misled by the modification. The doctrine of waiver we have seen, was correctly laid down as applicable to the case, notwithstanding the pleadings, and this but calls the attention of the jury to that doctrine where and as laid down in other instructions.

Complaint is also made that the court erred in modifying this instruction.

If the jury believe from the evidence, that the plaintiff in his application for insurance, made a false or untrue statement as to the value or ownership of the property insured, as an inducement to the company to enter into the contract of insurance, and that the company relied upon such statements, and was induced thereby to enter into such contract of insurance, and that the company relied upon such statements, and was induced thereby to enter into such contract of insurance, then such contract is voidable by its terms and conditions, by the company, and it cannot be enforced against it, and the verdict should be for the company."

The modification consisted in adding: "Unless you further believe from the evidence that defendant after it had full knowledge of such representations, waived its right to the modification. The defendant might waive its right under the circumstances contemplated in the instruction to a forfeiture, and it was competent to

submit that question to the jury, and entirely proper to submit the two questions—the right to a forfeiture, and the waiver of that right in one instruction.

The third instruction asked by defendant was properly refused, because it is but a mere argument on facts, and presents no legal proposition.

Objection is urged to the ruling of the court in refusing to allow certain questions propounded to witnesses upon the trial, to be answered. The question was asked whether the figures in an account of one Daniel Smith corresponded in amount with figures given the witness by Ernest Grunert. He had not previously had his attention called to this matter, and made answer in reference thereto. A witness cannot be impeached in the mode thus sought to be pursued. Wagoner, the defendant's secretary, was asked: "You may state upon what portion of the total value of personal property your company grants insurance." We are unable to see any pertinent, legitimate conclusion to which the answer to this could lead. The suit is on a policy. What was here done—not what was usually done, was important. The answer could not tend to prove either the actual or the estimated value of the goods insured. Again, he asked: "You may state if, after the policy was issued by your company, you ascertained, at any time before or after the loss, that William Grunert, in his application for insurance, misrepresented the value of the property." Very clearly this called only for an opinion, a conclusion from facts—of the witness and not a statement of facts. What William Grunert represented should have first been proved, and it would then have been competent to prove facts contradictory of that representation. Other questions immaterial and irrelevant were also asked the same witness which we do not deem of sufficient importance to specially notice.

The questions of fact are settled against appellant by the judgment of the appellate court, and demand no notice from us.

We think the judgment below right, and it must therefore be affirmed.

Judgment affirmed.

UNITED STATES CIRCUIT COURT,

EASTERN DISTRICT, WISCONSIN.

SMITH ET AL.

vs.

COVENANT MUT. BEN. ASSOCIATION, OF  
GALESBURG, ILL.\*

The certificate of a benefit society in the clause relating to payment, originally contained a blank space after the words "paid as a benefit to," followed by the words "or in the event of \* \* \* prior death to the legal heirs or devisees of the holders of this certificate." It was filled up by inserting the words "his devisees" in the first hiatus, and the word "their" after "in the event of." The insured left no will.

*Held*, That it was not the intention that no claim should arise unless there were devisees under a will. In the absence of a will the benefit would accrue to his legal heirs.

In order to recover on a certificate which provides that in the event of a claim the association shall levy an assessment and pay over the amount collected, it must be shown that the assessment was levied and the amount collected.

DYER, J.

On the eighteenth day of January, 1881, the defendant association issued its certificate, by which it constituted Benjamin F. Smith a member of said association, with all the rights and privileges of the same, upon the following conditions and agreements:

"That at any time during the continuance, and before the termination of this contract, upon due notice and satisfactory proofs of the death of the aforesaid member having been filed with the secretary of the association, he having in all respects fully complied with the

\* Decision rendered, May, 1885.



conditions of this certificate, an assessment shall be levied upon all the members holding certificates in force at the time of the death of the said member, for the full amount named in their respective certificates: provided, however, that when the aggregate of such assessments would exceed the limit of this certificate, then the assessment shall be levied ratably, according to the certificate held by each, for an aggregate amount not less than the limit of this certificate, and the sum so collected on such assessments (less all amounts which may be added for expense and collection costs) the association hereby agrees well and truly to pay, or cause to be paid, as a benefit to his devisees as provided in last will and testament, or, in the event of their prior death, to the legal heirs or devisees of the holder of this certificate, \* \* \* within ninety days from the date of the acceptance of said evidence of death, any assessment or other indebtedness of the said member to the association being first deducted therefrom; but in no case shall the payment under this certificate exceed twenty-five hundred dollars."

This is a suit upon this certificate, brought by the plaintiffs as the legal heirs of Benjamin F. Smith, who died intestate. The plaintiff's complaint sets out fully the provisions of the certificate, and then alleges that notice and proof of death were duly given; that the insured on his part fully complied with all the conditions of the certificate to be performed by him, but that the defendant has not paid, and refuses to pay the plaintiffs the sum of \$2,500 named in the certificate; and judgment is demanded for that sum, with interest.

The defendant demurs to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. In support of the demurrer, it is urged (1) that the complaint is fatally defective, since it does not allege that the insured left devisees under a last will who were first to take under the certificate, and that such devisees have died, by reason whereof the legal heirs of the insured are entitled to claim the amount of the insurance; (2) that there is no allegation in the pleading that the association has levied an assessment upon its members to pay the loss, or, having levied an assessment, has collected the same, and failed to pay over the sum collected.

The questions raised by the demurrer are novel, and not free from difficulty. The certificate is partly printed and partly written; and before it was completed as a contract of insurance, there was in it a blank space after the words "paid as a benefit to," which was fol-

lowed by the words in print, "or, in the event of \* \* \* prior death, to the legal heirs or devisees of the holder of this certificate," etc. When the certificate was filled up, the words "his devisees, as provided in last will and testament," were written in the space after the words "paid as a benefit to," and the word "their" was inserted after the words "or in the event of." The contention of counsel for the defendant is that no liability was created to pay to the legal heirs of the insured, except in the event of the prior death of devisees; that the word "their" refers to the word "devisees," that if the insured made no will,—as it is conceded he did not,—there were no devisees, and as there were no devisees to die, the contingency never arose when the association became obligated to pay to the legal heirs of the holder of the certificate; hence that this action cannot be maintained by the present plaintiffs,—and it was suggested on the argument that if an action would lie at all on the certificate, it would lie only in favor of the administrator of the estate of the insured. This argument is ingenious, but in our judgment unsound. The certificate, it is true, is very awkwardly worded; but, as the contract of the association, it should be so construed, if possible, as to give it efficacious meaning, rather than to defeat the intention of the parties and destroy its character as an obligation.

It must be presumed that the association intended by this certificate to pay to somebody as beneficiary whatever sum should be collected by assessment from other certificate holders, not exceeding the sum specified in the certificate. The vitality of the contract was not to depend upon the fact that the insured should make a last will and testament, in which devisees should be named, nor do we think that a remedy upon the contract in favor of the legal heirs of the insured was intended to be made absolutely dependent upon the prior existence and death of such devisees. The insured might die intestate. It could not have been in the contemplation of the parties that in that event there was to be no beneficiary entitled to sue upon the contract. The certificate, fairly and reasonably construed, means, we think, that if the insured should choose to make a last will in which devisees should be named, then such devisees were to become the beneficiaries entitled to receive and recover the sum collected by assessment on account of the certificate. But no obligation was imposed upon the insured to make a last will. He might, if he chose, leave his estate to be divided among legal heirs as the law should direct its division; and, in that event, as no devisees would

exist, the benefits of the certificate would accrue to the heirs. In other words, the effect of the contract is that if the insured has made no will, and if, therefore, no devisees are in existence, his legal heirs shall become the beneficiaries entitled to enforce payment in a suit upon the certificate. This view of the rights of the parties accords with the sense and meaning of the contract.

The only case cited by defendant's counsel in support of his contention upon this point is *Worley vs. Northwestern Masonic Aid Association*, 10 Fed. Rep., 227, and at first glance, the opinion of Judge Love, concurred in by Judge McCrary, seems opposed to the views we here express. But we think that case is distinguishable from the one at bar. In the case cited, as we conclude from the reported statement of facts, the defendant contracted to pay to the devisees of the decedent certain sums of money, and this was the extent of its obligation. In no specified contingency was the money to be paid to any other persons than devisees. It appears that the decedent made no will, and therefore, as there was no devisees, the administrator brought suit on the policy, and it was held that he could not maintain the action because the sum which the corporation expressly and only agreed to pay to the devisees of the deceased was not a part of the estate, and therefore was not recoverable as such by the administrator. Expressions in the opinion of the court indicate that in the view taken of the case even the legal heirs of the decedent could not have recovered on the certificate; but the sole question in judgment was whether the administrator could maintain the action, and in that view it may be conceded, for the purposes of the present discussion, that the case was rightly decided. It was there said that neither the decedent nor the defendant corporation intended by their contract to provide for the widow, heirs, orphans, or creditors of the decedent, but only for his devisees, and as there were no devisees, there was no beneficiary in existence who could enforce the contract. In no contingency was the insurance to be paid to any other persons than devisees. Without, therefore, questioning here the correctness of the ruling upon the precise point there decided, we think that decision does not meet the case at bar, and that the plaintiffs are the present holders of the legal interest in the certificate in suit.

The remaining point raised by the demurrer presents a more serious question, namely: Conceding that the heirs of the decedent are the legal beneficiaries entitled to the benefits conferred by the certificate, what are the rights of the parties respecting a recovery

upon the certificate on failure of the association to pay the death loss? The theory upon which the suit is brought is that, as in the case of an ordinary life policy of insurance, the plaintiffs are entitled to recover the full sum named in the certificate, without regard to the levy of any assessment upon certificate holders, or the collection by the association of any amount so levied. After deliberate consideration of the question, we are of opinion that this is an erroneous view of the relations and rights of the parties under the certificate. The association covenants in its agreement, not absolutely to pay the sum of \$2,500, but to levy an assessment upon all members holding certificates at the time of the death of the deceased member, and to pay the sum so collected on such assessment as a benefit to the designated beneficiaries, such payment in no case to exceed the sum of \$2,500. Thus it is apparent that the obligation of the association is only to pay whatever amount is collected from other certificate holders, not exceeding the sum named. Suppose that no assessment whatever is made, or suppose, an assessment being made, nothing is collected, is the association liable, absolutely, for the sum named in the certificate, in an action like the present? If not, what is the remedy for failure to levy an assessment, or for failure to collect the amount of an assessment actually made but not responded to by the holders of certificates? If it appeared that an assessment had been levied, and the amount thereof had been collected, but its payment to the beneficiaries refused, there would be no doubt, in the absence of other grounds of defense, of the plaintiff's right to recover in a money action the sum so collected, not exceeding \$2,500. But this state of the case is not alleged. And, indeed, it was admitted on the argument that no assessment was levied to pay this loss, and therefore no sum had been collected for that purpose by the association from certificate holders. Hence the difficulties above suggested.

It seems clear that the right acquired by virtue of the certificate held by the decedent was to an assessment upon all members holding certificates, and the payment of the amount collected on such assessment within a prescribed period of time, the assessment not to exceed the limit of the particular certificate. We were at first disposed to think that it was incumbent upon the plaintiffs, in any view of the case, to make a demand for an assessment in order to lay the foundation of a recovery. But we are now convinced that the duty to make an assessment was imposed by the contract, and if the association failed in this duty, the beneficiaries had the right,

by appropriate proceedings, to compel the performance of it. Undoubtedly a court, in such a proceeding, could enforce the discharge of that duty by compulsory measures against the officers and managers of the association, or, perhaps, through its own officers, by making the necessary assessment and collection at the cost of the association, or of the certificate holders assessed. It is quite clear that every certificate holder agreed to look for payment to the specific mode set out in the certificate; that is, by assessments and collections within a certain limit as to the amount to be assessed. The holders of certificates are co-members of the association, who have, in effect, agreed to insure each other, and have stipulated as to the mode in which their liability to the heirs or devisees of a deceased member may be ascertained and enforced. But this plan would be defeated altogether if such heirs or devisees could obtain a judgment against the association for the amount limited in the certificate, without regard to any assessment or any amount collected on an assessment, and enforce payment in the ordinary mode in which judgments for money are enforced. To this it may be replied that the association is liable to suit for breach of covenant if it fails to make the required assessment. This may be so. But if so, what would be the measure of damages? To say that the measure of damages would be the amount of the certificate, with the interest from the date when it should have been paid, and to give judgment therefor against the association, would be to ignore the fact that the parties have provided a specific mode for the payment of the sum named in the certificate, viz., an assessment against and collection from the living members. The ordinary life policy rests upon the promise of the company to pay the sum therein named. A policy-holder in such a company is under no obligation to pay anything for the benefit of the holders of other policies. Here the insured pays seven dollars to insure a member, and agrees to meet mortuary assessments from time to time, as set out in the conditions of the certificates. The association does not contract absolutely itself to pay the sum named in any certificate, but, as we have seen, only that it will assess the living members and pay over, within a certain time, the sum collected on such assessment.

The scheme is a peculiar one, but we do not perceive how the court can avoid its peculiarities and impose upon the association an obligation directly to pay money which it did not in that form assume. We hold, therefore, that to entitle the plaintiffs to recover in their present form of action, they must allege and show that the associa-

tion has levied an assessment upon certificate holders to pay the death loss, and has collected the amount of such assessment, and has failed to pay the sum so collected. In short, to maintain this action, it must appear that the association has in its hands the money collected by assessment which it ought to pay to the plaintiffs as the beneficiaries entitled to the same. If the association has failed to make the required assessment, or, having made an assessment, has neglected to collect the same, the plaintiffs' remedy is in some other form of action or proceeding.

The demurrer to the complaint is sustained, with leave to the plaintiffs to amend within 30 days, as they shall be advised.

Mr. Justice Harlan heard the arguments of counsel, and concurs in this opinion.

## SUPREME COURT OF NEW HAMPSHIRE.

JUNE TERM, 1883.

EASTMAN

v.s.

PROVIDENT MUT. RELIEF ASS'N.\*

The plaintiff's intestate was a member of the defendant association. The defendant is a corporation chartered "for charitable and benevolent purposes, and for furnishing relief and assistance by means of mutual agreements and payments of funds." His certificate of membership recited that "a sum not exceeding \$2,000, will be paid by the association as a benefit, upon due notice of his death, and the surrender of this certificate, to such person or persons as he may, by entry on the record book of the association, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies." He was in good standing when he died. No person's name was entered on the record book of the association, or on his certificate, showing to whom the benefit should be paid. *Held*, That the plaintiff could not recover.

Under such a contract as stated in the last syllabus, a member has the power merely of appointing the person who shall receive the benefit. He is bound by the rules of the association, and cannot change the beneficiary in a way not in conformity with them.

The benefit is not assets which his administrator can recover.

Parol evidence is not admissible to show to whom the member intended the benefit to be payable.

HARDY, *for Plaintiff*.

C. C. ROGERS, *for Defendant*.

Assumpsit, by the administrator of George H. Gigar, to recover \$2,000 insurance on the life of the deceased. The defendant is a corporation duly chartered and organized. By the charter, the

\* From Central Law Journal.

object of the association is, "for charitable and benevolent purposes, and furnishing relief and assistance by means of mutual agreements and payments of funds;" and is authorized "to establish all by-laws and regulations which may be necessary to carry out the purposes of this act." Among the by-laws of the association are the following:—

Art. 2, Sec. 1. Object.—To secure to dependents and loved ones assistance and relief at the death of a member.

Art. 9, Sec. 1. Membership.—Any person between the ages of eighteen and fifty-five, who shall pass a satisfactory medical examination, etc., may become a member of this association.

Art. 10, Sec. 1. Benefits.—When a member dies, the association shall pay, within sixty days, to his direction, as entered upon his certificate of membership, the sum of \$2,000. \* \* \* Among the duties of the secretary of the association prescribed by the by-laws, are these: "He shall forward, within sixty days after receiving notice of the death of a member, to the trustees of the subordinate association, to which said member belonged, the amount of benefit relief due such member, taking their receipt therefor." It is made the duty of the trustees of the subordinate association to receive from the secretary all benefits due deceased members, and immediately pay the same to the beneficiaries, taking a proper receipt therefor, and forwarding the same to the secretary, accompanied by the certificate of membership of the deceased member.

The deceased was a member of the subordinate association No. 10, located at Tilton. He paid all fees, dues, and assessments to the time of his death, and was otherwise in good standing. He left many creditors, but no father, mother, brother, sister, nor, so far as known, any other relative. He held a membership certificate in common form, which after reciting his admission, provided this: "In accordance with the provision and law governing said association, a sum not exceeding \$2,000 dollars will be paid by the association as a benefit, upon due notice of his death and the surrender of the certificate, to such person or persons as he may, by entry on record book or on face of the certificate, direct said sum to be paid, providing he is in good standing when he dies. No person's name was entered either on the record books of the association or on the certificate, showing to whom the benefit should



be paid. No question is made as to the proper notices of his death nor that all proper demands and proofs have not been made according to the by-laws. Neither the \$2,000, nor any part of that sum has been paid to the administrator or any other person.

At the trial before the court, the defendants offered to show that the deceased had, for two years prior to his death, been engaged to be married to A. G. S., residing at Tilton; that he said, at the time of making his application for membership, that he designed the benefit ultimately to be made payable to her, and that he afterwards frequently told her and others that he intended the benefit to be payable to her in case of his death, and this was repeated to her a short time before his death. The evidence was excluded, and the defendant excepted. The plaintiff offered to show, by parol evidence, that the deceased omitted to insert any name as beneficiary, with the intention of making the benefit of \$2,000 payable to his administrator for the benefit of his estate. The evidence was excluded, and the plaintiff excepted. The court found the plaintiff entitled to recover, and the defendant excepted.

Reserved.

SMITH, J.

The defendant is a corporation organized for charitable and benevolent purposes. These purposes, as described in its charter, are the "furnishing relief and assistance by means of mutual agreement and payments of funds." Its object is more particularly defined in its by-laws to be "to secure to dependent and loved ones assistance and relief at the death of a member." It resorts to assessments for the procurement of the funds to discharge the mutual obligations of its members, and is governed by by-laws which limit and define those obligations. Such associations for the general purpose of mutual protection resemble life insurance companies, and are uniformly treated by the courts as life insurance companies in substance. May on Ins. (2d ed.), § 550, a, and cases cited; *Smith vs. Bullard*, 61 N. H.—: *Dennett vs. Kirk*, 59 N. H., 10; *Commonwealth vs. Wetherbee*, 105 Mass., 149; *State vs. Merchants' Exchange Mutual Benev. Soc.*, 11 Reporter, 163 (Mo., Nov., 1880).

The defendant's contract bound it to pay a sum not exceeding \$2,000, as a benefit upon due notice of the death of the plaintiff's intestate, and the surrender of his certificate of membership, to such person or persons as he might, by entry on the record book of the association or on the face of his certificate, direct the sum to be paid. Does the neglect of the holder of the certificate to designate

a beneficiary in the manner specified, absolve the association from the payment of the benefit? We think the question must be answered in the affirmative. The charter, by-laws, and certificate of membership, taken together, show what was the understanding of the parties. It was no part of the object of the association to provide a fund for the payment of a deceased member's debts, however meritorious such a purpose might be; nor, as in this case, where there are no heirs, and the claims of creditors are less than the amount of the benefit, that the benefit should escheat to the State. The maxim "*expressio unius*" etc., applies. The designation in the certificate of one class, to wit, such person or persons as Gigar should appoint, excludes the other classes,—heirs, creditors, etc.

The certificate was neither payable to the deceased, nor to his administrator, assigns, heirs, estate, or legal representatives. The defendant promised to pay the benefit to no one, save such person or persons as Gigar should direct by entry upon the certificate or record book of the association. By the contract he had the mere power of appointing the person who should receive the benefit. He was bound by the rules of the association and could not change the beneficiary in a way not in conformity with them: *Kentucky Mut. Masonic Ins. Co. vs. Miller's Admr.*, 13 Burke, 494. We cannot know why he did not exercise his power of directing to whom the benefit should be paid. He may not have decided in his mind who should receive it. He may have intended that his associate members should not be called upon to contribute the sums required to fulfill his contract with the association. The only presumption is that he intended not to do what he omitted to do: *Worley vs. N. W. Masonic Asso.*, 11 INS. LAW JOUR. 141 (Feb., 1882, U. S. Cir. Ct. Dist. of Iowa). He had no personal interest in his membership, and his personal representative, as such, can take no interest in it, after his death.

The benefit is not assets, for if the administrator can collect the money, it must go primarily to Gigar's creditors. The charter, by-laws, and certificate, all show that neither party had any such understanding. If Gigar had exercised the power of appointment, it is plain that the administrator could not maintain a suit to recover the money. How does Gigar's neglect to exercise it give him the power? There being no contract to pay to Gigar or to his legal representative, there is no breach. The plaintiff fails. In *Worley vs. N. W. Masonic Aid Asso.*, *supra*, the facts are similar to those in

this case, and it was held that the plaintiff, who was administrator of the assured, could not recover. *McClure, ex'r., vs. Johnson*, Sup. Ct., Iowa (Oct., 1881), 13 Reporter, 13, decides that where a life policy, by its terms, is payable to a person other than the assured or his representatives, the payee cannot by will make a different disposition of the fund from that directed by the policy. Our conclusion is that the plaintiff cannot recover.

The evidence offered as to Gigar's intention as to whom the money should be made payable, was inadmissible to vary the construction of the certificate, and was insufficient to constitute a trust. *Mason vs. Colburn*, 99 Mass., 342.

Exceptions sustained.

ALLEN, J., did not sit; the others concurred.

## SUPREME COURT OF CALIFORNIA.

COOK

vs.

LION FIRE INS. CO.\* )

In determining whether a bill of sale of personal property, based upon a previously existing debt, was absolute, or intended merely as a mortgage, the question to be settled is, whether the intention of the parties was to cancel the debt, or to secure it; this is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties. In determining this question, a person who was present at the time the bill of sale was made, may testify to what he knew of the transaction.

At the time of the making of the bill of sale in question, plaintiff's vendor was indebted to him, and was desirous of obtaining more money. He, thereupon, offered to sell him a certain fifteen hundred cords of wood, in payment of the money which was due, and was about to be procured. The bill of sale of the wood was accordingly executed upon such consideration, and the plaintiff immediately took possession, and had it insured in his own name. The application for insurance stated that the plaintiff was the sole owner of the property. Subsequently the plaintiff took another bill of sale for the same wood, from his vendor. At the time of the first bill of sale, it was agreed in writing between the parties, that the plaintiff would sell to his vendor, the wood, if, by a certain date, the latter paid him the sum of one thousand eight hundred dollars.

*Held*, That the whole contract was an absolute sale, with the privilege to repurchase reserved to the vendee; that the vendee was the sole owner of the wood, and was not guilty of a breach of warranty in representing himself as such in his application for insurance.

In an action against a fire insurance company, to recover the amount of a loss, the assured is not limited to the amount claimed in the proof of loss, if he was induced to execute the same through the false representations of the company's adjuster.

T. C. VAN NESS, *for Appellant*.

A. P. CATLIN, *for Respondent*.

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\* Opinion filed, August 26, 1885. From *W. C. Reporter*.

FOOTE, C.

This is an action upon a fire insurance policy. The evidence shows that just before the policy was issued, Cook, the plaintiff, had a debtor, one Cardwell; that Cardwell wanted to get some more money from Cook and offered to sell him a certain fifteen hundred cords of wood in payment of the money which had been, and was about to be procured by him; that as a part of this negotiation it was understood that Cook was to insure the wood to be transferred to him by Cardwell, and for that purpose these two visited one Meredith, who was the agent of the Liverpool & London & Globe Insurance Company, resident at Folsom. Upon stating to this agent the nature of the proposed sale, Cook was advised by him to take a bill of sale from Cardwell of the wood, and further, to take possession of it, as the parties Cook and Cardwell seemed desirous that the transaction should be a sale and not a mortgage. Accordingly, a bill of sale was drawn by the agent, and signed by Cardwell and a formal delivery of possession was taken by Cook and the wood remained at the spot where he took such possession, on the bank of the American River, and he was never after that divested of its possession until it was burned. After this bill of sale and delivery of possession took place and the agent, Meredith, was, by Cook and Cardwell, put in possession of a full knowledge of the title of Cook to the wood and all the facts leading up to and surrounding this sale and delivery, he made out an application addressed to the Liverpool & London & Globe Company for an insurance policy on this property in the sum of four thousand dollars, and Cook signed the same. This application set out what was the understanding of the agent, Cook, and Cardwell at that time, viz.: that Cook was the sole owner of the property. It was forwarded to San Francisco, and in due course of mail was received by the Liverpool & London & Globe Company's agent there. The risk was not accepted by that company, but it submitted the application to the Lion Company without any knowledge of it on the part of Cook, and upon this application, thus submitted, the Lion Company issued its policy to Cook, and it was forwarded through the L. & L. & G. Co. to Meredith, the latter company's agent at Folsom; Cook at that time was absent and Meredith informed Cardwell of the arrival of the policy, and that the premium on it ought to be paid; thereupon Cardwell paid to Meredith for Cook the amount of the premium for the Lion Company, which company received it. This wood was after that time burned, with five hundred other cords of wood which Cook had

bought from Cardwell and which was piled near that first purchased. An adjuster was sent up to Folsom after the wood was destroyed by fire, to look into the matter. Neither he nor his company at this time seem to have claimed that the policy thus issued to Cook was void. Their claim appears to have been that he had only a lien upon the wood for the money he had paid Cardwell for it, viz.: the sum of two thousand two hundred and ninety dollars; that he was not the sole owner of the wood, and that his insurable interest amounted in no event to more than the sum above stated. It also appeared that after the insurance policy was issued Cook took a second bill of sale from Cardwell, including the one thousand five hundred cords of wood first sold and delivered, and the five hundred last sold, and that at that time five hundred and fifty dollars of the two thousand two hundred and ninety dollars was paid Cardwell; it also appears in evidence that at the time of the first sale it was agreed in writing between Cook and Cardwell that the former would sell to the latter the fifteen hundred cords of wood if by a certain date Cardwell paid Cook the sum of one thousand eight hundred dollars.

The whole contract in writing between Cook and Cardwell, comprised in both the bill of sale and the agreement contemporaneous with it, was a sale with the privilege to repurchase reserved to the vendor. It was simply in effect this, that Cardwell, upon paying to Cook within a certain time, and that but a brief one, a certain sum of money, might repurchase the property, or, what is the same thing, divest title from Cook, which had by the sale vested in him: *Haynie vs. Robertson*, 58 Ala., 40, and cases there cited; *Hickman vs. Cantrell*, 9 Yerger, 172; *Magee vs. Catchings*, 33 Mis., 673, 693. It was not a mortgage or a pledge: *Jones on Chattel Mortgages*, sec. 26. In this case the transaction was based, it is true, upon a previously existing debt, and the question to be settled is whether the intention of the parties was to cancel that debt or secure it, and this again, is a question of fact to be determined by the negotiations had at the time, and the subsequent acts of the parties: *Jones on Mortgages*, sec. 326. Here a debt was paid, and no claim afterwards made for it, the party purchasing expressly declared that he would not take a mortgage but must have a sale of the property to himself. A bill of sale was written and signed, and the property was delivered to the vendee by the seller, and taken possession of by him, and no acts of ownership have since been exercised by the vendor over it, he having the privilege conceded to him, that if he would pay at a certain time a certain price for the property he

might purchase it, and that was the full extent of his rights, and the title to the wood vested in Cook : Jones on Mortgages, sec. 326 ; Hooper vs. Bailey, 28 Miss., 328. So that when Cook signed the application which was made out by Meredith, and described himself as the sole owner of the wood, he described his title truthfully, and committed no breach of warranty as to the policy issued by the Lion Insurance Company. The plaintiff did nothing, so far as the application was concerned, to forfeit the policy, even conceding that it was an application which the Lion Company might justly consider as made to itself.

But it is said Cook cannot recover from the Lion Company anything more than amount claimed in the proof of loss, viz., the sum of two thousand two hundred and ninety dollars. This cannot be so. It sufficiently appears, although on this point the evidence is conflicting, that the insurance adjuster did not deal fairly with Cook, in getting him to sign and swear to the proof of loss, and we do not think the latter should be bound by any such statement. When an adjuster faithfully and fairly obtains an affidavit of loss from one claiming against his company, it is to be commended ; but when the contrary appears, as in this case, the party thus entrapped should not be bound by it to his prejudice.

The Lion Company was not deceived by Cook in any way; he stated nothing that affects his rights, untruthfully to it or its agents, either verbally or in writing. He is shown to have been the sole owner of the property insured, to have suffered the full amount of the loss as such owner, and through no fault of his.

As to the point made that the question asked Meredith "What he knew of the transaction" as between Cook and Cardwell, was immaterial, we are of opinion that it, and the evidence he gave in answer thereto, were admissible, because it was proper that all the negotiations had at the time the bill of sale was made, and also the subsequent acts of the parties in relation thereto, should be considered in determining the question of fact as to whether the intention of the parties was to cancel the debt or secure it: Jones on Mortgages, sec. 326.

One of the main facts to be determined by the court who tried the case, a jury being waived, was whether the bill of sale represented an absolute sale of the wood, or was executed for security. This was a question to be decided by that tribunal on a preponderance of evidence, as if before a jury: Perkins vs. Eckert, 55 Cal., 400-404. The court having determined this question in the affirma-

tive, and a conflict of evidence on the point appearing to exist, the judgment should not be reversed.

Upon the whole case, we are of opinion that the judgment and order denying a new trial should be affirmed.

Searls, C., and Belcher, C. C., concurred.

BY THE COURT.

For the reasons given in the foregoing opinion, the judgment and order are affirmed.



## SUPREME COURT OF IOWA.

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*Appeal from Muscatine Circuit Court.*

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STRICKLAND

vs.

COUNCIL BLUFFS INS. CO.\* }

A mere soliciting agent who had never had any connection with the policy had no power to consent to its assignment, although the blank form provided for consent by an agent and where the policy provided that it should be void if assigned without the company's assent, the agent had no power to bind the company.

PENTZER & KIMBLE and H. J. LAUDER, *for Appellant.*RICHMAN & TITUS and J. CARSKADDAN, *for Appellee.*

ADAMS, J.

The policy in question was issued to one Mrs. M. C. Osborne, and covered a stock of goods. She sold the stock to the plaintiff and assigned to her the policy. In the policy is a provision in these words: "If this policy shall be assigned before a loss, without the consent of the company endorsed thereon, then and in such case this policy shall be void." The plaintiff averred that the company consented to the assignment through its authorized agent, one Myers. The company denied that it consented to the assignment, and denied that Myers had any authority to give such consent. The fact appears to be that Myers was an agent of the company, and made an in-

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\* Opinion filed, June 9, 1895.

dorsement upon the policy by filling and signing a printed form in these words:—

"The Council Bluffs Ins. Co. hereby consents that the interest of Mrs. C. M. Osborne in the within policy, subject, nevertheless, to the terms and conditions herein mentioned and referred to, be assigned to Rosa E. Strickland.

" *Wilton, Iowa, August 30, 1882.*

[Signed]

" J. E. MYERS, Agent."

Immediately, however, after the execution of this writing and the redelivery of the policy to the plaintiff, Myers learned that the property had been attached by the creditors of Mrs. Osborne. He thereupon demanded the policy and erased his name. But the fact of the erasure is not material, in the view which we have taken of the case. The burden was upon the plaintiff to show that Myers had authority to bind the company by the consent indorsed upon the policy, and the company insists that there is no evidence whatever of such authority. In our opinion the position of the company must be sustained. As evidence of such authority the plaintiff relies in part upon the form of consent printed upon the policy. Following the place designed for a signature was the word "agent," showing that the intention of the company was that the consent should be given by an agent. But we are unable to see that it indicated anything in relation to Myers' authority. So far as the evidence shows, the company never intrusted him with this policy. It appears clearly that he did not issue the policy, nor solicit the application for it, and at the time he was asked to consent to the assignment of the policy we think that he had never sustained any relation to it of any kind. The most that we could infer is that the blank form in question was a general form designed for use by some of the company's agents. If it had been put into the hands of an agent who had power to pass on the risk, it would seem to indicate that the particular agent had power to pass on the new risk arising out of the assignment. Perhaps, indeed, such agent would be deemed to have power to pass on the new risk and indorse the consent independently of any blank form of consent prepared for and delivered to him. But Myers was not, we think, such agent. At all events, this particular policy does not show that he was, and does not show that the company held him out as such agent. Having reached this conclusion, we have to say that we see no evidence of any kind that the company held Myers out as having greater power than he actually possessed.

We come, then, to the question as to what the evidence shows that

his power actually was. On this point the burden was on the plaintiff. But the company showed affirmatively, by the testimony of the secretary of the company, that Myers was only a soliciting agent; that he was not furnished with blank policies, with power to pass on the risk and make the contract of insurance, but with blank applications, which, when filled, he transmitted to the company for its approval. This evidence, so far as we can see, is undisputed. "I was the agent of the defendant. I had no instructions from the defendant." While it is not contended, of course, that a want of instructions could confer power, the plaintiff's position, as we understand it, is that the mere appointment of a person as agent would confer the power to pass on the risk and make the contract, in the absence of any restrictions. But in our opinion this position cannot be sustained. If there were but one class of agents, then the appointment simply of a person as agent might be regarded as conferring the powers usually exercised; but it is not only well known, but the evidence shows, that there is a distinct class, called soliciting agents, who have not the power to contract. This being so the mere appointment as agent could not be regarded as conferring any greater power than is exercised by this lower class called soliciting agents. Probably policies issued by the company, if any, upon applications obtained by him, passed through his hands for delivery. His testimony might be regarded as showing that he made a record of the policies which were issued upon the applications obtained by him. The fact that he made a record is relied upon as showing that he was more than a soliciting agent. But there was nothing which he could do which would clothe him with power not otherwise conferred. If, as he testified, he received no instructions, and if, as the secretary testified, he was furnished with nothing but blank applications, he made the record on his own motion, and for his own convenience merely.

We have referred, we believe, to all that is relied upon as showing Myers' power, and we have to say that in our opinion it utterly fails to show that he had the power to bind the company by any contract or consent.

Some other questions are presented, but, in the view which we have taken, they will not probably arise upon another trial.

The judgment must be reversed.

## LOWER COURT DECISIONS.

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### ALLEGATION OF VALUE.—ERROR AS TO INTEREST.

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*Superior Court of Kentucky.—Appeal from Bourbon Circuit Court.*

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ROYAL INSURANCE CO.\*

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vs.

HORTON.

An allegation which fails to state that the plaintiff insured had any interest in the property at the time it was burned is fatally defective, and is not cured by an averment of ownership at the time the policy was issued, nor by an averment that the plaintiff was damaged by the fire in the sum of \$400.

An error in the judgment as to the date when interest should be computed is but a clerical misprision and not ground for reversal until motion has been made to correct in lower court.

GEORGE B. EASTIN, *for Appellant.*

G. C. LOCKHART and A. DUVALL, *for Appellee.*

RICHARDS, J.

It was provided by the old code that "allegations of value or of amount of damage shall not be considered as true by the failure to controvert them." The court of appeals, in construing this statute, declined to give its provisions a literal interpretation when applied to allegations of amount and damage in some actions, but enforced them in others.

They affirmed judgments by default without proof of values or

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\* Opinion filed, June 1, 1885.

damage in the following actions: For the amount of a physician's account, for medical services and medicines, *Harris vs. Ray*, 15 B. Monroe. 628; for the value of goods sold and delivered upon an account, *Francis vs. Francis*, 18 B. Monroe, 57; *Mills vs. Brown*, 2 Met., 406; *Wood vs. Wells*, 2 Push., 197; and for interest by way of damages on an account, *Francis vs. Francis*, 18 B. Monroe, 57.

On the other hand, they held that such allegations must be proved, though not denied, in actions *ex delicto* to recover damages, *Daniel vs. Judy*, 14 B. Monroe, 393; *Clark vs. Seaton*, 18 B. Monroe, 229; in an action upon a merchant's account, *Pate vs. Pate*, MS. Op., 1858; in action against carriers for failing to deliver goods *Huston vs. Peters*, 1 Met., 558; an action for the value of cash notes with which the defendant had promised to pay a debt, *Marrs vs. Prather*, 3 Met., 196; for the value of clothing which defendant had promised to furnish a slave, *Skillman vs. Muir*, 4 Met., 282; and for the value of a barrel of whisky, where the defendant had promised to deliver the whisky "or its value," *Beam vs. Hayden*, 5 Bush., 426.

In some of these opinions the court seemed to realize the difficulty in announcing a principle, or principles of pleading upon which their previous decisions could consistently stand, and criticised the grounds upon which some of them had been placed, without directly overruling them. For instance, it had been said in *Harris vs. Ray* and *Francis vs. Francis*, that the allegations of the values of the items mentioned in the accounts were to be taken as true without proof, because the plaintiff had stated the amounts claimed were "due and owing," but when reviewing these decisions in *Skillman vs. Muir*, the court said the reasons assigned for them in the opinions were insufficient. This criticism was manifestly just, since to allege the amounts were "due and owing" was but to state the conclusion of the pleader, which could not be taken as true without first conceding the correctness of the values he had placed upon the items in the accounts.

But nevertheless, we find the court, in the subsequent case of *Wood vs. Wells*, assigning the same reason for affirming a judgment by default without proof, that had been advanced in *Harris vs. Ray* and *Francis vs. Francis*.

The court said in *Spillman vs. Muir*: "The true distinction between these two cases (in which judgments without proof had been affirmed) and the others seems to be, that in each of the former there was, upon the facts stated, an implied assumpsit to pay the amount claimed by the plaintiff, whilst there was no assump-

sit, express or implied, in either of the latter, to pay the sum claimed." But it had been previously held in *Pate vs. Pate*, which was an action upon a merchant's account, and was subsequently held in *Beam vs. Hayden*, that nothing short of an averment that the defendant had promised to pay the particular sum claimed would authorize a judgment without proof, where the recovery was to be measured by value or damage; in other words, that the language of the code was to be literally interpreted, and no allegation of value, or damage, was to be taken as true unless proved. But where the defendant has promised to pay a particular sum, it is no longer a question of what would be the fair value or damage, for he must pay according to his express promise. Nothing is open to inquiry, the contract being such as the law countenances, except whether, for a sufficient consideration, he made the promise alleged, which is taken for confessed upon his failure to deny.

This being the condition of the adjudications under the old code, it became imperative for the legislature to declare more explicitly, when adopting the new code, what should be the practice in such cases. Instead of it being true, as argued by the learned counsel on both sides (each citing authority for his particular view), that the new statute is but declaratory of the principles announced in former decisions, we are of the opinion that it was intended to dispel the confusion, which the court itself so frequently recognized as existing among the adjudications.

We find, therefore, the new statute declaring: "Every material allegation of a pleading must, for the purposes of the action, be taken as true, unless specifically traversed," with certain exceptions. In enumerating those exceptions it is said in the 4th subdivision: "Allegations concerning value or amount of damage, not accompanied by an express promise, or by a statement of facts showing an implied promise, to pay such value or damage; such allegations, so accompanied, need not be proved unless traversed," Civil Code, §126.

This provision does not relate, no more than that found in the old code, to cases where the amount the defendant is to be bound for has been liquidated, and he has promised to pay that exact sum. If he has, by a valid contract, fixed the amount he is to pay, the law will not inquire whether it was reasonable, and hence the statute has no applicability; it could only have been designed to regulate the effect of the allegation in those cases where the value of an article, or the amount of damage, was to be investigated and deter-

mined by proof. If the averment is that the defendant agreed to pay the specified sum for the thing sold, or for services rendered, or as due adjustment of damages, it would stand confessed, in the absence of a denial, by force of the general clause of §126, even if subdivision 4 did not exist.

But sub-section 4 was intended to go beyond this. It makes no distinction between amounts sought to be recovered as values of things, and amounts sought to be recovered as damages. Neither is confessed by a failure to controvert, unless the pleader alleges an express promise, or facts from which the law will imply a promise, to pay. *McKinley vs. Barney*, 6 Ky. Law Rep., 304. As said by this court in that case: "It is difficult to state a case in which the law will imply a promise to pay a particular amount; the implication is only that the defendant shall pay whatever the articles or services are worth, or whatever damage may be caused by the failure to perform the contract."

The cases in which this sub-section authorizes judgments without proof may be thus illustrated: Where the petition alleges the defendant agreed to pay the value of the thing sold and delivered, and states its value, this is "an express promise" within the purview of the statute; if it simply alleges the thing was sold and delivered, and was reasonably worth the amount stated, this would be "a statement of facts showing an implied promise to pay such value." If the petition stated the defendant, being a common carrier, had agreed to safely deliver goods at a certain point or pay the damages sustained; that they were of a certain value, and the defendant had lost them, whereby plaintiff had sustained damage to the amount named, this would be an express promise to pay "such damage;" if it simply stated that the defendant had agreed to deliver the goods at a certain place, but had lost them, stating their value, and alleging that to be the amount of damage, the law would imply from these facts a promise within the statute to pay "such damage."

This court said in *McKinley vs. Barney*, *supra*, as there is no case in which the law implies that a certain amount of damages is to be paid on the breach of a contract, "the statement of facts showing an implied promise to pay the damages alleged must be such that, being taken as true, require the defendant to pay the amount claimed" That was a cross-action by the defendant to recover damages for a breach of warranty in the sale of a boiler. The court said: "If the defendant in this case had alleged that the defects in the boiler were such as to decrease its value \$125, there would have

arisen an implication of a promise to pay that sum, that being the measure and extent of the plaintiff's liability on his warranty. But the allegations do not contain any facts from which it could be inferred that the plaintiff ought to pay that sum." Hence the judgment without proof was reversed.

It only remains to apply these principles to the case at bar. Horton sued on two contracts of insurance against loss by fire, setting each out in a separate paragraph. The express promise of the company was to pay to the assured "all such immediate loss or damage, not exceeding in amount the sum or sums insured, nor the interest of the assured in the property; \* \* \* the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss." In order, therefore, to fix the company's liability, under its express promise, for any specific amount, it was necessary to allege that to be the actual cash value of the interest of the assured in the property at the time of the loss. Nothing short of this could have authorized a judgment by default, without proof, for the amount claimed.

The first paragraph fails to state that the plaintiff had any interest in the wheat at the time it was burned. This is not cured by the averment that he owned the wheat on the day the policy was issued. The question is, do the facts stated, when uncontroverted, necessarily determine the amount of damage averred to be that for which the defendant was liable? If they do not, then the judgment by default, without proof, was erroneous.

Of course the plaintiff was not damaged unless he had an interest in the wheat at the time it was burned. No action for damages to personal property can be sustained on an averment of ownership at any other time than that at which the damage occurred.

The law will not, for this purpose, presume that the plaintiff was the owner on the day the damage occurred from the simple admission that he was the owner on a day prior thereto.

Nor was the defect cured by averring the property was destroyed "to the loss and damage of this defendant (meaning plaintiff) in the sum of \$400." This was but the conclusion of the pleader, and could not be true without assuming the truth of the omitted fact of ownership, without which the judgment by default was unauthorized.

But the second paragraph, claiming \$493 under the second policy, is not subject to the same criticism. The error as to the date from which the interest should be computed was but a clerical misprision,



which, if it exists, should be corrected by motion in the lower court, and, until such motion is overruled, cannot be made the ground of reversal.

Moreover, the interest erroneously allowed would not amount to as much as \$2.00, a sum so small as to require the application of the maxim, "*De minimis non curat lex.*"

The judgment is reversed as to the \$400 and interest, and affirmed as to the \$493, with interest from April 1, 1884, until paid, each party to pay his own costs in this court.

## WHAT CONSTITUTES A VALUED POLICY.

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*United States District Court of Minnesota.*

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WILLIAMS

vs.

CONTINENTAL INS. CO. OF NEW YORK CITY.\*

Insurance was effected under an open cargo policy on a shipment of wheat, the amount of insurance and premium being specified in the certificate.

*Held*, That the policy was not valued, and the value was open to proof from the market price.

In admiralty.

C. K. DAVIS, *for Libelant*.

W. D. CORNISH, *for Respondent*.

NELSON, J.

A libel is filed to recover upon a contract of insurance, by which the defendant agreed to cover a quantity of wheat shipped from the port of Duluth to the city of Buffalo. An open cargo policy was issued by the company to its agents at Duluth, and the contract of insurance arises under this policy and the certificate by which this particular risk was taken. This certificate was executed and delivered to the shippers, October 19, 1881, and is in the words and figures following :—

“ CONTINENTAL INS. CO. OF NEW YORK CITY.

“ No. 12,104.

INLAND MARINE DEPARTMENT.

“ This certifies that Munger & Markell are insured under and subject to the conditions of open policy No. 649, issued by the Continental Ins. Co. of New York City at the Duluth agency, in the sum of eight thousand dollars, on 17,000 bushels wheat, in board cargo of schooner *Carlingford*, at and from Duluth

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\* Decision rendered, September, 1885.

to Buffalo. \$8,000 at 2.25 per cent is \$180, which premium is hereby acknowledged to have been received. Loss, if any, payable to Munger & Markell, or order hereon, and return of this certificate.

" This certificate is not valid unless signed by the authorized agent for this company at Duluth, Minn.

[Signed]

"GEO. SPENCER & Co., Ag'ts.

" *Duluth, Minn., October 19, 1881.*"

And indorsed across the face of which certificate was the following:—

" Permission is given to load and carry a locomotive and tender on deck to Prince Arthur's Landing, if towed there, also to tow below said Landing.

A stipulation is filed under which the court is to determine whether the policy is an open or a valued policy. This is the sole question, and its solution settles the controversy. It is agreed that if it is decided that the policy is open and not valued, there can be no recovery. The contract of marine insurance is an agreement by the company, in consideration of a certain sum paid, called "premium," to indemnify the insured for loss which may occur by the perils of the sea mentioned in the policy. This is accomplished by paying the insured the value of the property at risk, with expenses of putting it on board, etc. In case of a total loss the insured loses as much as the property was worth when shipped. A valued policy is one in which the value of the property insured is fixed and agreed upon by both parties to the contract, and in case of total loss it is not necessary that proof should be made of the market value at the time and place of shipment. Unless a certain amount is stipulated and expressed in the contract of insurance as the value of the property upon which the risk is taken, it is necessary that proof should be made of the market value in case of loss. Such a policy of insurance is denominated an open policy. How can the value be determined, in this case, except by proof of the market price per bushel at Duluth? No value is fixed in the certificate; only the extent of insurance is limited to \$8,000, and the certificate of insurance states that it is made under and subject to the conditions of the open policy issued to the company's agents. These writings constitute the policy by which the contract of indemnity is effected, and as the value of the wheat is not agreed upon and expressed in the policy, it is an open and not a valued policy. The evidence of custom and usage offered cannot be received to change the contract.

A decree will be entered dismissing the libel.

## TEMPORARY TRANSFER OF PART INTEREST.

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*Circuit Court of Trumbull County, Ohio.—May Term, 1885.*

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INS. CO. OF N. A. AND PHENIX INS. CO. OF BROOKLYN

vs.

ROWLAND K. LEWIS.

The policies provided that the insurance should cease in case of change of ownership. *Held*, That the transfer of a part interest in the goods insured which was retransferred to the insured before fire did not forfeit the insurance.

## BY THE COURT.

These cases came up on an error from the common pleas court, where they had been tried together upon an agreed statement of facts, in substance as follows: September 9, 1880, Samuel A. Hall, of Coalburg, the owner of a stock of goods, procured insurance in the above companies. April 18, 1881, while the policies were in force, Hall sold and assigned a one-half interest in the stock of goods covered by the policies to J. M. Kuntz. Kuntz continued to hold the one-half interest thus acquired until June 1, 1881, when he sold his interest to Miller for Hall, and on the same day Miller transferred that interest to Hall, and Hall again became the owner of the entire stock. July 19, 1881, a fire occurred, the goods were destroyed and the loss sustained. Since the loss, the interest of Hall in the policies has been assigned to Rowland K. Lewis, who sues to recover for the loss.

It is claimed by the companies, that the provisions of the policies stipulated for a forfeiture in case of a transfer of the property, or a portion thereof. By the agreed statement of facts it appears that there had been an assignment of the goods during the life of the policies, and it is urged that the policies became void. There is no material difference in the conditions of the two policies. That of the North American provides that if the goods are assigned, sold, or en-

cumbered, the insurance shall terminate. The Phenix policy provides that the goods may be disposed of and the policy assigned, provided the consent of the company by indorsement in writing is obtained; otherwise the insurance shall cease from date of change in ownership. There was no consent given by either company, nor was there an assignment of policies.

There is no doubt that when Hall sold to Kuntz there was an entire change of ownership. Neither was owner of any distinct part, but they were joint owners, and during the time of joint ownership neither company would have been liable in case of loss. The question is, when Hall transfers a part of his interest, and the policies are suspended, what is the effect upon the policies when the insured again becomes the owner and acquires the same interest he held at first?

No case cited directly and squarely makes the question here presented. One in the 12th Maine is similar. The assured sold all his goods and leased the store, and then took them back. It was held that it was not alienation within the meaning of the policy, and the assured was allowed to recover. In Wood on Insurance, the doctrine is laid down that a sale of part of the goods insured only invalidates the policy as to the part sold, and a re-conveyance reinstates the assured as to all rights under the policy, although the policy was suspended during the alienation.

The Maine case and those cited in Wood, seem to sustain the claim of Lewis. The stock would be constantly changing. New purchases would be made to keep up the stock. Such changes are contemplated by the parties to the policies, and the companies would be liable for the goods destroyed at the time of the loss. At the time of the loss, Hall had become the owner of all the goods, and the policies had again become binding between the parties. The parties to the contract recognized Hall's right to sell to strangers, and to replenish his stock with new goods by purchases from others. Suppose he had sold his goods to five others, and then made purchases from a sixth person, and replaced the old goods with a new stock. There would be no question as to the validity of the policies in such a case.

A life insurance case, cited in the 5th Rhode Island, is not analogous to the case at bar. It is the opinion of this court that the industrious counsel have presented all authorities which bear on this case, and after a careful examination of them, the action of the court below in giving judgment to Lewis is affirmed.

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DIGEST OF DECISIONS

IN INSURANCE CASES, RENDERED IN THE UNITED STATES SUPREME  
AND CIRCUIT COURTS, AND IN THE STATE  
SUPREME COURTS.

AGENT.

§ 180. FIRE.—*Of Insurer or Insured in Mutual Company.*—Where the agent employed by a mutual company filled up the answers to the application, this did not constitute him the agent of the insured, notwithstanding a provision in the by-laws made the soliciting agent, the agent of the insured.

Columbia Ins. Co. vs. Cooper, 14 Wright, 381.

*Nassauer vs. Susquehanna Mut. Fire Ins. Co.*

Rep'd Jour'l, p. 913.

PA. S. C.

ASSIGNMENT.

§ 181. FIRE.—*To Secure a Loan not Illegal.*—An assignment of a policy merely to secure a loan, is not one which is forbidden in the usual prohibition against assignments, since the interest of the insured is not divested, and where such assignment is made with the company's consent, the re-assignment upon

payment of the loan without consent does not work a forfeiture, and the insured is entitled to recover.

*True vs. Manhattan Ins. Co.*

Rep'd Jour'l, p. 896.

Col. U. S. C. C.

#### ASSIGNMENT.

§ 182. *LIFE.—Title in case of Absence of Insurable Interest.*—One having no interest, as relative or creditor, in the preservation of the life of an insured person can acquire no title, by assignment or otherwise, and payment of premiums, to the sum payable on the death of the insured. If, in such case, the insurance company pays him the amount of the policy, the administrator of the insured person may recover it in an action against him. A. insured her life, naming as beneficiary B., who had no insurable interest in A.'s life. B. paid all the assessments. Immediately after A.'s death, B. assigned said policy to C., who likewise had no insurable interest. C. was recognized by the company as the assignee, and he collected the sum insured from the company. In an action by the administrator of A. against C.: *Held*, That such a contract of insurance was not void, ab initio, nor against public policy, but that as to B. and C. it was void; therefore, the plaintiff was entitled to recover said sum paid by the insurance company to C.

*Gilbert vs. Moose*, 8 Out., 74; *Wegman vs. Smith*, Pa. S. C.

*Meily vs. Herahberger*.

Rep'd Jour'l, p. 888.

Pa. S. C.

#### BENEVOLENT ASSOCIATION.

§ 183. *LIFE.—Assignment when Invalid.*—Where a certificate of membership in a benevolent association insures the beneficiary's life, and provides that no assignment of the certificate "shall be valid, unless approved by the secretary," an assignment without such approval will be invalid. *Query*.—Whether such a certificate or policy in a benevolent association, incorporated under the laws of Missouri, and which has for its object to give financial aid and benefit to the widows and heirs at law of deceased members, or to such uses and purposes as the member shall by last will appoint, is assignable.

*Harman vs. Lewis*.

Rep'd Jour'l, p. 927.

Mo. U. S. C. C.

## FREIGHT.

§ 184. MARINE.—*Liability of Cargo for in case of Sinking and Abandonment to Underwriter.*—A boat loaded with coal was sunk in a storm. The insurers of the boat united with the insurers of the cargo to raise it, after which it was taken to the port of destination and delivered by the former to the owner. *Held*, That where as here, payment of freight was a condition of delivery, the cargo becomes bound to the boat until by some default on its part, or some event which puts an end to the voyage, it becomes impossible to fulfill the contract of affreightment. If it reaches the port of destination by any agency set in motion by the original carrier, the lien for freight remains. *Held*, That the abandonment of the cargo to the insurer did not release the carrier's lien for freight, where there was no abandonment of the vessel.

Hubbel vs. Ins. Co., 74 N. Y., 246.

Hughes vs. Sun Mutual Ins. Co.

Rep'd Jour'l, p. 929.

N. Y. C. A.

## INCUMBRANCE.

§ 185. FIRE.—*Notice of Subsequent may be Required.*—A provision in the policy requiring the insured to give notice of a subsequent incumbrance reducing his interest below the amount insured, under penalty of forfeiture, is not against public policy.

Nassauer vs. Susquehanna Mut. Fire Ins. Co.

—§ 180.

## MUTUAL COMPANY.

§ 186. FIRE.—*When a By-law is not Binding on Insured.*—The insured is not bound by a by-law of which he was ignorant, before he became a member, and he does not become a member until actually insured.

Columbia Ins. Co. vs. Cooper, 14 Wright, 331.

Nassauer vs. Susquehanna Mut. Fire Ins. Co.

—§ 180.

## PREMIUM NOTE.

§ 187. FIRE.—*Right of Action by Receiver Of Foreign Mutual Corporation for Assessments.—Evidence of Representations of Agent when Inadmissible.—Liability of Members in Foreign Mutual Company.*—A mutual fire insurance company incorporated under



the laws of Pennsylvania, is entitled to bring an action in a Maryland court, for the use of the receiver of such company, to recover from a Maryland policy-holder assessments upon his premium note, where the suit is not brought by such receiver in his official capacity. Although it is settled law, that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, yet it may do business in all places where its charter allows, and local laws do not forbid; and in the absence of such prohibition by local laws, may institute suits in the courts of States, other than those under whose laws it has been established.

Canada Southern R. R. vs. Gebhard, 109 W. S., 527.

By the decree of a court in Pennsylvania, a receiver was appointed for a mutual fire insurance company, created under the laws of that State. The decree also declared the company to be dissolved, but at the same time it referred to the Act of Assembly under which it was passed. That act provided that when an insurance corporation is dissolved, the court decreeing such dissolution may appoint a receiver to take charge of its effects, and collect the debts and property due and belonging to it, "with power to prosecute and defend suits in the name of the corporation or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement of the unfinished business of the corporation." In an action in this State brought in the name of the corporation for the use of the receiver, it was *Held*, That the decree of dissolution was no bar to the action. Where the application expressly agrees that the company shall not be bound by any act or statement of an agent restricting its rights, oral evidence showing an agreement of the general agent that assessments should be limited otherwise than as stipulated in the premium note, is inadmissible.

Thompson vs. Ins. Co., 104 U. S., 252; Ins. Co. vs. Mowry, 96 U. S., 514. Distinguishing Ins. Co. vs. Eggleston, 96 U.S., 572, and Ins. Co. vs. Woodworth, 83 Penn. St., 223.

Schedules of the losses and expenses, and amount and adjustment of assessments required when made by a receiver con-

firmed by the court, and a levy ordered accordingly is conclusive upon the policy-holders.

Hummel & Co.'s Appeal, 78 Pa., 320; Glenn vs. Williams, 60 Md., 93. Distinguishing Herkimer County Mutual Ins. Co. vs. Fuller, 14 Barb., 373; American Ins. Co. vs. Schmidt, 19 Iowa, 502; Planters' Ins. Co. vs. Comfort, 50 Miss., 662; Pacific Mutual Ins. Co. vs. Guse, 49 Mo., 329.

No subsequent revocation of license will affect the validity of a premium note already given.

*Lycoming Fire Ins. Co. vs. Langley.*

Rep'd Jour'l, p. 897.

Ms. C. A.

## PROOFS OF LOSS.

§ 188. FIRE.—*Sufficiency of how Determined.—Harmless Omission of Incumbrance through Mistake will not Forfeit.*—The sufficiency of proofs of loss by fire is to be determined by considering the information actually contained in them, together with the circumstances attending their presentation, and the conduct of the officers of the company in relation to the case. If the testimony elicits any circumstances from which a waiver by the company of the strict proof mentioned in the policy may be inferred, the case should be left to the jury. An honest mistake on the part of the policy-holder in omitting to mention the existence of a lien upon the insured property, when such omission causes no injury to the insurer, will not work a forfeiture of the policy.

Pa. F. Ins. Co. vs. Dougherty, 40 Leg. Int., 334; Beatty vs. Lycoming Ins. Co., 16 P. F. S., 9.

*Thieroff vs. Universal F. Ins. Co.*

Rep'd Jour'l, p. 923.

Pa. S. C.

## RISK.

§ 189. FIRE.—*Illegal Use, or Keeping or Storing in Violation of the Policy only Suspends Insurance.*—The premises insured were duly licensed when the insurance was effected, under the Massachusetts standard form of policy, which provided that it should be void if articles subject to legal restriction should be kept

in quantities or manner different from those allowed or prescribed by law. *Held*, That the policy was only suspended during the temporary use of the premises after the expiration of the license and before its renewal, but was revived upon such renewal.

Lane vs. Maine Ins. Co., 12 Me., 44; Powers vs. Ocean Ins. Co., 19 La., 28; Obermeyer vs. Globe Ins. Co., 43 Mo., 573; New England F. & M. Ins. Co. vs. Schettler, 38 Ill., 166; Mitchell vs. Lycoming Ins. Co., 51 Pa. St., 402; Schmidt vs. Peoria Ins. Co., 41 Ill., 295; Ins. Co. of North America vs. McDowell, 50 id., 120, 129.

*Hinckley vs. Germania F. Ins. Co.*

Rep'd Jour'l, p. 918.

Mass. S. J. C.

#### TITLE.

§ 190. FIRE.—*What is Sufficient Statement of in Proofs of Loss.*—Where there is no provision calling for a detailed statement of title or interest in proofs of loss, a general statement of ownership is sufficient though another may have some interest.

Fowler vs. Springfield Ins. Co.

*Hinckley vs. Germania F. Ins. Co.*

—§ 187.

§ 191. LIFE.—*Of Executrix where Insured is not the Beneficiary.*—The policy was procured by the insured, who paid the premiums, on his own life, payable to his daughter. The insured by will bequeathed \$500 to the daughter on condition that she should assign her interest to his estate; if not, the executrix was directed to claim the premiums paid from the daughter. *Held*, That the contract was solely between the company and the daughter, and the executrix was not entitled to recover the amount paid for premiums.

*Wilmaser vs. Continental Life Ins. Co.*

Rep'd Jour'l, p. 891.

Iowa S. C.

#### VALUATION.

§ 192. FIRE.—*Evidence of Agent's Consent to.*—Where the property was valued by the applicant for more than double the real value, it was not error to refuse the admission of evidence

that the agent consented to the valuation, and fixed the insurance accordingly.

*Nassauer vs. Susquehanna Mut. Fire Ins. Co.*

— 180.

#### WATCHMAN.

§ 193. FIRE.—*Evidence as to when Inadmissible.—Pleading.*—The answer of the company was general, denying that the plaintiff had performed the conditions of the policy. *Held*, That evidence to show that a watchman had been kept as required by the policy was inadmissible under such general pleading. Such defense must be specially pleaded.

*Bittenger vs. Providence Washington Ins. Co.*

*Rep'd Jour'l*, p. 893.

Col. U. S. C. C.

## REPORT OF DECISIONS

RENDERED IN INSURANCE CASES, IN THE UNITED STATES  
SUPREME AND CIRCUIT COURTS, AND IN THE  
STATE SUPREME COURTS.

*From certified transcripts in our possession.*

### SUPREME COURT OF PENNSYLVANIA.

*Error to the Common Pleas of Lebanon County.*

MEILY

vs.

HERSHBERGER, ADMINISTRATOR.\*

One having no interest, as relative or creditor, in the preservation of the life of an insured person can acquire no title, by assignment or otherwise, and payment of premiums, to the sum payable on the death of the insured. If, in such case, the insurance company pays him the amount of the policy, the administrator of the insured person may recover it in an action against him.

A. insured her life, naming as beneficiary B., who had no insurable interest in A.'s life. B. paid all the assessments. Immediately after A.'s death, B. assigned said policy to C., who likewise had no insurable interest. C. was recognized by the company as the assignee, and he collected the sum insured from the company. In an action by the administrator of A. against C.:

*Held*, That such a contract of insurance was not void ab initio, nor against public policy, but that as to B. and C. it was void; therefore, the plaintiff was entitled to recover said sum paid by the insurance company to C.

\* Decision rendered, May 25, 1885.

Assumpsit, by Henry Hersherberger, administrator of Emma Hersherberger, deceased, against Charles H. Meily, to recover the sum of \$1,000, being the amount of a policy of insurance on the life of plaintiff's intestate received by the defendant.

On the trial, before McPherson, J., the following facts appeared :

On April 13th, 1872, Emma Hersherberger made application to the U. B. Mutual Aid Society of Pennsylvania, for membership. On May 3d, 1872, her application was granted ; and on May 6th, 1872, a policy of insurance for \$1,000 payable at her death in favor of Dr. S. S. Meily was issued to her by said society. Dr. Meily was not related to Emma Hersherberger, and had no insurable interest in her life. He paid all the dues and assessments, after her admission to membership, until the time of her death, which occurred on August 13th, 1877. The next day he assigned his interest in said policy, for full value, to Charles H. Meily, to whom subsequently the said society paid the sum of \$989, as assignee of beneficiary.

The personal representatives of Emma Hersherberger thereupon brought this action against the said Charles H. Meily to recover the amount received by him upon said policy of insurance.

The defendant requested the judge to charge :—

(1.) That the plaintiff's evidence and declaration disclose the fact that the contract made between Emma Hersherberger, plaintiff's intestate, Dr. S. S. Meily, and the U. B. Mutual Aid Society, was against public policy, and therefore void, ab initio, the plaintiff cannot recover. Refused.

(2.) The first and other annual payments and all assessments paid to the U. B. Mutual Aid Society during the life of Emma Hersherberger, and the payment of the money after death to Charles H. Meily, defendant in this case, were all paid in pursuance of said contract, which was void because against public policy, and therefore plaintiff cannot recover. Refused.

(3.) The said contract being void at its inception, continued so until its final consummation by the payment of the money after the death of the said Emma Hersherberger by said U. B. Mutual Aid Society, and plaintiff cannot recover. Refused.

Verdict for plaintiff for \$1,385.07 and judgment thereon. Whereupon defendant took this writ assigning for error, inter alia, the refusal of the court to affirm the above points submitted.

FRANK E. MEILEY and WILLIAM M. DEER, *for Plaintiff in Error.*

This is a wagering policy. *Gilbert vs. Moose's Administrators*, 13 Weekly Notes, 489 ; 8 Out., 74.

If, therefore, a policy taken out on the life of a person by one not having an insurable interest therein, is a wager contract, and against public policy, it is void in whole, and no recovery can be had upon it. *Clippinger vs. Hepbaugh*, 5 W. & S., 315; *Hatzfield vs. Gulden*, 7 Watts, 152.

BASSLER BOYER, *for Defendant in Error.*

The question at issue, is not whether an executed contract can be reformed, but whether a void contract can be attacked.

THE COURT.

This case is upon all fours with *Wegman vs. Smith*, recently decided in the Eastern District and not yet reported. It was contended on the trial below, however, and urged here that the contract of insurance was void, *ab initio* ; that it was against public policy, and the plaintiff therefore could not recover. The defendant's first point asked the court so to instruct the jury.

We do not regard it in this light. The policy was taken out by Emma Hershberger on her own life. This she had a right to do. The loss was made payable to Dr. S. S. Meiley with a provision that he should pay all other dues and assessments. He was not a relative of the insured, was not a creditor, and had no insurable interest in the life of Emma Hershberger. It was a mere wagering transaction on his part, and comes directly within the ruling of *Gilbert vs. Moose* (13 Weekly Notes, 489 ; 8 Out., 74), and the latter cases upon the same subject.

Judgment affirmed.

SUPREME COURT OF IOWA.

*Appeal from Scott Circuit Court.*

WILMASER, EXECUTRIX,  
vs.  
CONTINENTAL LIFE INS. CO.\*

The policy was procured by the insured, who paid the premiums, on his own life, payable to his daughter. The insured by will bequeathed \$500 to the daughter on condition that she should assign her interest to his estate; if not, the executrix was directed to claim the premiums paid from the daughter.

*Held*, That the contract was solely between the company and the daughter, and the executrix was not entitled to recover the amount paid for premiums.

Plaintiff brought this action to recover certain premiums paid to defendant by plaintiff's testate on a life insurance policy. The circuit court sustained a demurrer to the petition, and plaintiff, declining to amend, judgment was entered dismissing the cause, from which she appeals.

FRED. HEINZ, *for Appellant.*  
THURSTON & HULL, *for Appellee.*

REED, J.

It is alleged in the petition that in 1870 the defendant issued to the decedant, Francis S. Wilmaser, a policy of insurance on his life, by which it agreed, in consideration of the payment by him of certain premiums during his lifetime, to pay to his daughter, Clara M. Wilmaser, the sum of \$1,300 after his death, and that during his life-

\* Opinion filed, June 5, 1885.



time he paid to defendant the sum of \$425.13 as premiums on said policy; and that before his death he made a will, which has been admitted to probate, by which he devised to said Clara M. the sum of \$500, on condition that she would assign to his estate all her right and interest under said insurance policy, which also contained a provision which directs his executrix, in case said Clara M. shall decline to make such assignment, to assert a claim against defendant for the amount of the premiums paid by him on the policy. It is also alleged that the executrix has tendered to said Clara M. the amount of said devise, and requested her to assign the policy, but that she had declined to make such assignment, and the prayer is for judgment for the amount of the premiums paid by the testate on the policy.

We entertain no doubts as to the correctness of the ruling of the circuit court on the demurrer. The policy constituted a contract between the insured and the defendant, by the terms of which defendant was bound, on the payment by him of the premiums, to pay the stipulated sum to the beneficiary at his death. One of defendant's undertakings by the policy was to pay the stipulated sum. Another was to pay it to the beneficiary named. The promise to pay the amount of the policy to Clara M. Wilmaser is as certainly a part of its undertaking as is the promise to pay the sum named, and it clearly is a material part of it. The will of the insured cannot have the effect to alter the contract in any of its material parts, for the undertakings of one of the parties to an agreement cannot be changed without his consent by any act of the other.

When the death of the insured occurred, the conditions precedent to defendant's liability to the assured had all happened. From that moment she had a valid claim upon it, by the terms of the policy, for the amount of money which it had covenanted to pay her, and its liability in that regard was in no manner affected by the will.

**Affirmed.**

UNITED STATES CIRCUIT COURT OF COLORADO.

BITTENDER

vs.

PROVIDENCE WASHINGTON INS. CO.\* }

The answer of the company was general, denying that the plaintiff had performed the conditions of the policy.

*Held*, That evidence to show that a watchman had not been kept as required by the policy was inadmissible under such general pleading. Such defense must be specially pleaded.

SAM. P. ROSE, *for Plaintiff*.

PATTERSON & THOMAS, *for Defendant*.

HALLETT, J. (Orally.) .

Mr. Geo. W. Bittenger brought an action against the Providence Washington Insurance Company on a policy of insurance. He alleged, in general terms, that he fulfilled the conditions of the policy; I believe, set out the policy also. The defendant answered, in the like general terms, that he did not observe the conditions of the policy. "Defendant, further answering, denies that on the first day of November, 1883, or at any other time, said Atkinson gave notice of proof of loss, as provided in said policy, and denies that said Atkinson performed all and singular the conditions of said policy on his part to be performed."

At the trial, the defendant contended that upon this state of the pleadings the plaintiff was bound to prove affirmatively that he had

\* Decision rendered, August 3, 1885.

fulfilled and executed all the terms of the policy, and if that was not true, that the defendant was at liberty to offer evidence to the point that some of the conditions had not been fulfilled, as that the property was allowed to remain vacant and unoccupied for some time, and that it was not kept in operation, the property being a mill and furnace and the like; that no watchman was kept on the premises, as required by the terms of the policy, and, perhaps, some other things of the same character. This evidence was excluded, on the ground that such defense must be pleaded specially. The question has been argued on motion for new trial, and I see no reason to reverse the ruling which was made at the trial. It is laid down in the books that it is not necessary to set forth in the complaint a condition subsequent, and that a defendant relying upon it must plead it. This is true under systems of pleading which admit of more general defenses than ours. Under the code of this State, it is provided that the answer shall be special. No doubt is entertained that this requires a specific denial to each allegation in the complaint, and if it be said that the plaintiff has declared only generally, there is some doubt upon that, inasmuch as he has set forth the policy in his complaint; if the defendant accepted that method of declaring, he was still bound to plead his defense specially. In section 586, May on Insurance, the rule is so laid down. I think there can be no doubt as to its correctness. It would be extraordinary if a plaintiff coming into court with one of these policies of insurance, should be bound to have witnesses to every thing that is set down in the policy, to prove everything which may be set up as a defense. I say that would be most remarkable, and nobody would have greater reason to complain of it than the insurance company itself, because, if plaintiff should be fortified in all points with an extraordinary number of witnesses, the cost would be very great.

The rule is, that in respect to all such matters the insurance company must plead its defense specially, in order that it may put the matter in issue.

The motion for new trial will be denied, and judgment on the verdict.

## UNITED STATES CIRCUIT COURT OF COLORADO.

TRUE

vs.

MANHATTAN FIRE INS. CO.\* )

An assignment of a policy merely to secure a loan, is not one which is forbidden in the usual prohibition against assignments, since the interest of the insured is not divested, and where such assignment is made with the company's consent, the re-assignment upon payment of the loan without consent does not work a forfeiture, and the insured is entitled to recover.

## RULING ON DEMURRER.

HALLETT, J. (Orally).

True against the Manhattan Fire Ins. Co., is an action upon a policy of insurance. It is averred that the Manhattan Company issued to the plaintiff a policy upon certain property in Poncha Springs, and thereafter and before the loss occurred, the same property was reinsured in the Phoenix Co. The defendants answered separately, denying the matters alleged in the complaint, and then setting up a separate defense, that after the policy was made, and before the loss, plaintiff assigned and transferred his policy to his brother, whose christian name is to the defendant unknown, which assignment was sanctioned and assented to by the Manhattan Company and that the brother remained the owner of the policy until after loss occurred. To that the plaintiff replied that the assignment of the policy was to secure a loan made by his brother to him, which was then secured upon the property insured in and by said policy, and that before the institution of the suit, the plaintiff paid off and

\* Decision rendered, August 6, 1885.

discharged the loan which he had theretofore obtained, and as collateral to secure the payment for which he had transferred said policy to said H. A. True. Thereupon the said H. A. True reconveyed and made over the said policy, and all rights to recover any sum that might be due and payable therefor. There is a demurrer to this replication.

An assignment of a policy as a security of a loan of money is not one which is forbidden by the usual provision in policies to the effect that if any assignment be made without the written consent of the company it shall work a forfeiture of the policy, that clause is held to relate only to such assignments as divest the assignor of all interest in the policy and in the property. If he make sale of the property and thereupon assign the policy to the purchaser, without the consent of the company, it will avoid his policy. But any transfer which does not have the effect of divesting him of all interest in the property, if, notwithstanding the transfer, he still retains an insurable interest in the property, it does not have that effect. The reason is, the company is only entitled to know when the property passes into the hands of another, so that the risk may depend upon the other, instead of the person to whom the policy was issued. To borrow money upon the premises does not have that effect. In some policies there are clauses forbidding the incumbering of the property. Perhaps in such a case, the incumbrance would avoid the policy; but that is not the question here, because it is not alleged in the answer that the plaintiff incumbered the property, but only that he assigned his policy; so that the question is upon the answer and upon the replication to the answer, whether the assignment, being made as security for a loan, that will operate to discharge the company, and upon that it must be said that it will not have that effect. Upon paying off the loan, the right in the plaintiff to the policy was regained, became complete again; and I think this would be true whether there had been any express assignment or re-assignment by H. A. True or not.

This position is supported by authorities cited in *May on Insurance*, at section 379.

The demurrers to the replications will be overruled.

## COURT OF APPEALS OF MARYLAND.

APRIL TERM, 1884.

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*Appeal from the Court of Common Pleas.*

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LYCOMING FIRE INS. CO., USE OF  
J. ARTLEY BEEBER, RECEIVER,

vs.

JAMES L. LANGLEY.\*

A fire insurance company incorporated under the laws of Pennsylvania, is entitled to bring an action in a Maryland court, for the use of the receiver of such company, to recover from a Maryland policy-holder assessments upon his premium note, where the suit is not brought by such receiver in his official capacity.

Although it is settled law, that a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, yet it may do business in all places where its charter allows, and local laws do not forbid; and in the absence of such prohibition by local laws, may institute suits in the courts of States, other than those under whose laws it has been established.

By the decree of a court in Pennsylvania, a receiver was appointed for a fire insurance company, created under the laws of that State. The decree also declared the company to be dissolved, but at the same time it referred to the Act of Assembly under which it was passed. That act provided that when an insurance corporation is dissolved, the court decreeing such dissolution may appoint a receiver to take charge of its effects, and collect the debts and property due and belonging to it, "with power to prosecute and defend suits in the name of the corporation, or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement of the unfinished business of the corporation." In an action in this State brought in the name of the corporation for the use of the receiver, it was *Held*:

That the decree of dissolution was no bar to the action.

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\* From 52d Maryland reports.

Suit was brought by an insurance company to recover assessments upon a premium note executed by the defendant on the 24th of February, 1880. The note was as follows: “(\$567). For value received in policy No. 513, (risk commencing the 1st day of March, 1880), issued by the Lycoming Fire Insurance Company, I promise to pay to said company, or their treasurer for the time being, the sum of five hundred and sixty-seven dollars, in such portions, and at such time or times as the directors of said company may, agreeably to their act of incorporation, require.” The act of incorporation provided, that all persons insuring with the corporation thereby became members thereof, during the period they remained so insured, and every such member, before he received his policy, should deposit his promissory note for such sum as should be determined by the directors, and a part, not exceeding ten per cent of such note, should be immediately paid, “and the remainder of said deposit note shall be payable in part or the whole at any time when the directors shall deem the same requisite for the payment of losses by fire, and such incidental expenses as shall be necessary for the transaction of the business of said corporation, and at the expiration of the time of insurance, the said note or such part of the same as shall remain unpaid after deducting all losses and expenses during said term, shall be relinquished and given up to the maker thereof.” And in the defendant's written application for membership and insurance of his property, bearing the same date as the premium note, and immediately above his signature, and so printed as to attract notice, was the following covenant or agreement: “And the undersigned applicant for the proposed insurance, hereby covenants and agrees to accept the policy of the said L. F. I. Co., in accordance with its charter and by-laws. And it is expressly understood and agreed that the said company will not be bound by any act or statement made to or by the agent, restricting its rights or varying its written or printed contract, unless inserted in this application in writing.” *Held*:

That oral evidence was inadmissible on the part of the defendant to show that at the time the insurance was effected, the general agent of the company represented to the defendant that he had made special arrangements with the company, whereby the defendant would be liable to be assessed on his premium note to the amount of five per centum thereof, and no more during any one year that the contract of insurance was in force, and that the first assessment of five per cent would not be made until the 1st of March, 1881, and that the defendant gave his note upon the faith of this representation.

After his appointment by the court, on the 8th of October, 1881, the receiver in discharge of his duties made out several statements or schedules, showing first, the total indebtedness of the company; second, all the premium notes held by it, and the amounts expiring during each and every month since the date of the last assessment made by the company on the 14th of May, 1880; third, the amount of losses and expenses for each month from that date to the appointment of the receiver; and fourth, a statement of the percentage of assessment each class of notes expiring as aforesaid was liable for, and the aggregate amount to be collected thereon. He then filed a petition to the court presenting these statements and praying for a decree directing him to levy such an assessment upon the makers of the notes, liable to assessment, as would be necessary to pay the debts of the corporation and the costs and expenses attendant upon winding up its affairs. Afterwards the court, on the 12th of November, 1881, passed a decree reciting that the court after full examination of the petition, schedules and other evidence submitted, and upon due consideration after hearing had, found the facts set forth in the petition and schedules to be true, and then proceeded to specify in detail the exact percentage the receiver should levy upon each class of notes expiring during each month from July, 1880, to September, 1881, inclusive, and the sum of twenty per cent on all notes in force on the 8th of October, 1881. *Held*:

1st. That in thus prescribing the precise percentage of assessment, as well as

in other respects, this decree was an adjudication by a court of competent authority determining conclusively not only the amount of losses and expenses upon which the assessment was founded, but what notes should be assessed, and the exact percentage to which each class of them should be subjected.

- 2d. That the policy-holders or members were bound by this adjudication, in suits like the present.
- 3d. That a supposed error or irregularity in making the assessment could not be availed of by the defendant, a member of the corporation, in this suit.

The company, which had previously conducted its business in this State, sent to the insurance commissioner of this State in the usual course their statement for the year 1879, in order to continue business for the year 1880. This statement was sent, as required, within sixty days from the 1st of January, 1880. It was examined and laid aside for consultation. A demand was then made that the company should submit to a personal examination of its affairs, and to suit the convenience of the commissioner, the examination was not to be made until May, 1880. The statement was accepted by the commissioner upon that condition, and he issued his certificate under that condition. The certificate, though it bore date on the 1st of January, 1880, was not in fact issued until the 23d of April following. No examination was ever made because when the commissioner subsequently wrote to the company fixing a date therefor, they notified him that an examination would be unnecessary as they had withdrawn their agent from Maryland, and their license was then revoked. The certificate thus issued and dated the 1st of January, 1880, was to be operative until revoked. *Held:*

- 1st. That in all this there was no violation of any of the requirements of the Maryland Insurance Act of 1878, ch. 106.
- 2d. That there having been no revocation of the company's license or permission to do business in this State up to the 24th of February, 1880, when the defendant effected his insurance and gave his premium note, no subsequent revocation of the license could have the effect of rendering a contract which was then valid and subsisting, inoperative and void.

The case is stated in the opinion of the court.

The first eleven exceptions are unnecessary to be stated.

Twelfth Exception.—At the close of the testimony the plaintiff offered the three following prayers, the first of which the court, (Brown, J.) granted, but rejected the second and third :—

1. That the two certificates signed by Jesse K. Hines, insurance commissioner, dated January 1st, 1879, and January 1st, 1880, in connection with the evidence of the witness Jackson (if believed by the jury), show a sufficient compliance with the provisions of the Maryland statutes, to authorize it to make the contract of insurance mentioned in the premium note sued on in this case.

2. 1st. That the execution by the defendant of the premium note sued on in this case, and of the application for insurance offered in evidence by the plaintiff are admitted. 2d. That no competent



evidence has been offered to vary the contract between the plaintiff and the defendant, contained in said premium note. 3d. That no competent evidence has been offered of any such fraudulent representations made by the plaintiff or its agent, to the defendant, as are sufficient to invalidate the said contract. 4th. That the said premium note was by its terms in force on the 15th of May, 1880, and the 8th of October, 1881, and was liable to assessment by the plaintiff, and the assessment made by the Board of Directors of the plaintiff of twelve and a half per cent on premium notes, in force on the 15th of May, 1880, was a legal assessment, and included the premium note sued on in this case, and the assessment on said note of twenty per cent, made by the receiver, testified to by him as having been made under the order of court offered in evidence, was a legal assessment. And, therefore, if the jury shall find that the copies of the "Muncy Luminary," offered in evidence, were published in the County of Lycoming on the dates appearing on the face of said newspapers, and that thereafter, in the spring of 1882, the notice offered in evidence and signed by J. H. Gable, was by the direction of the receiver, mailed to the defendant at his place of business in Baltimore City, then the plaintiff is entitled to recover a sum equal to thirty-two and a half per cent on the premium note of defendant offered in evidence.

3. That all that part of the deposition of the witness Selby, from the eighteenth question to the end of the deposition, having been read subject to exception, be excluded from the consideration of the jury, the answers of the witness to the interrogatories-in-chief, from nineteen to twenty-four, inclusive, and the answers to the second, third, and fourth cross-interrogatories.

The defendant offered thirteen prayers, the sixth and eleventh of which the court granted; the others were rejected. The insertion of the rejected prayers is unnecessary; and the sixth and eleventh are contained in the opinion of this court.

The plaintiff excepted, and took this appeal, the verdict and judgment having been rendered for the defendant.

The cause was argued before MILLER, YELLOTT, ROBINSON, RITCHIE, and BRYAN, J.

JAMES H. GABLES, and BERNARD CARTER, *for the Appellant.*

THOMAS MACKENZIE, Jr., and JOHN V. L. FINDLAY, *for the Appellee.*

MILLER, J.

The appellant was incorporated under the laws of Pennsylvania as a mutual fire insurance company. After doing business with success for many years, it met with heavy losses and the corporation was dissolved in October, 1881, by a decree of Court of Common Pleas of Lycoming County, and J. Artley Beeber, was appointed receiver of its estate and effects, with power "to collect the debts and property due and belonging to it, and under the direction of the court to do all matters and things pertaining to his said office, and in accordance with the Act of Assembly in such case made and provided." In May, 1883, this suit was brought in the name of the corporation for the use of the receiver against the appellee, a Maryland policy-holder, to recover certain assessments upon his premium note. The trial resulted in a verdict and judgment for the defendant and the plaintiff has appealed. By this appeal and the exceptions taken at the trial, three principal questions are presented.

1st. Has the company the right to bring this action in a Maryland court?

2d. Was the note of the defendant rendered void by reason of the representations made to him by Selby, the agent of the company, at the time it was given and the insurance of his property effected, as stated in the defendant's sixth prayer?

3d. Can the recovery be defeated on account of the mode in which the assessments were made, as stated in the defendant's eleventh prayer?

First. This is not a case where the action is brought by a receiver in his official capacity, and hence it does not fall within the general rule that such an officer has no extra-territorial jurisdiction, and cannot go into a foreign State or jurisdiction, and there institute a suit for the recovery of demands due the person or estate subject to his receivership. The generally accepted doctrine in this country is, that his functions and powers for the purpose of litigation, are limited to the courts of the State within which he is appointed, and the principles of comity between nations and States which recognize the judicial decisions of one tribunal as conclusive in another, do not apply in such a case, and will not warrant a receiver in bringing an action in a foreign court or jurisdiction. *Booth vs. Clark*, 17

Howard, 322; High on Receivers, sec., 239. But here the plaintiff in the action is the corporation, and the suit is brought in its name. It has long been settled law that though a corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, yet it may do business in all places where its charter allows, and local laws do not forbid, and in the absence of such prohibition by local laws, may institute suits in the courts of States other than those under whose laws it has been established. Angell & Ames on Corporations, secs., 372, 373. But it is said the decree of the Pennsylvania court appointing the receiver also dissolved the corporation, and therefore no suit in its name can be maintained, and if the effect of that decree and the law of Pennsylvania under which it was passed, was to work an absolute and total dissolution of the corporation, the argument would be unanswerable. But has such a dissolution been effected? It is true the decree declares the company to be dissolved, but at the same time it refers to the "Act of Assembly," under which it was passed, and by reference to that act we find it provided, that when an insurance corporation is dissolved, the court, decreeing such dissolution, may appoint a receiver to take charge of its effects and collect the debts and property due and belonging to it "with power to prosecute and defend suits in the name of the corporation or otherwise, and to do all other acts which might be done by such corporation, if in being, that are necessary for the final settlement of the unfinished business of the corporation." Purdon's Annual Digest (1873-78), page 2,026, sec. 54. Similar provisions are almost invariably introduced into statutes, providing for the dissolution by judicial decrees of corporations of this character; and this is done in order to avoid the unjust operation upon the rights of both creditors and stockholders, of the harsh rule of the common law as to the effect of dissolution upon the property and debts of such corporations. The object and effect of such provisions, are to continue the corporation in existence for the special and limited purpose of collecting its assets, preparatory to the payment of its debts and distribution of the surplus, if any, to the stockholders, and to this end, suits are allowed to be brought "in the name of the corporation," in the same manner as if no decree of dissolution had been passed. Why should not such a law, upon principles of comity, be recognized in other jurisdictions, as well as the original law creating the corporation? In both cases, the foreign law authorizes suits to be brought in the name of the corporation, and we see no good reason why the courts of other States

should sustain an action in the one case, and deny it in the other. No decision has been referred to in which the question has been directly adjudicated, but the doctrine announced by the supreme court in the recent case of *The Canada Southern Railroad Co. vs. Gebhard*, 109 U. S., 527, would seem to be all that is needed in the way of authority upon the subject. In that case, the court after stating the general rule that a corporation must dwell in the place of its creation, and cannot migrate to another jurisdiction, though it may do business in all places where its charter allows, and the local laws do not forbid, proceeds thus: "But wherever it goes for business it carries its charter, as that is the law of its existence, and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, but if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation." There is no statute in this State forbidding the bringing of such suits in our courts, and we have no difficulty in sustaining this action.

Second. By granting the defendant's sixth prayer, the court instructed the jury that if they find from the evidence that Joseph Selby, Jr., was the general agent of the plaintiff, and that at the time the insurance was effected for which the defendant gave his premium note, he, the said Selby, represented to the defendant that he had made special arrangements with the company, whereby the defendant would be liable to be assessed on his said note to the amount of five per centum thereof, and no more during any one year that the contract of insurance was in force, and that the first assessment of five per cent would not be made until the 1st of March, 1881, and that the defendant gave his note on the faith of this representation, then the plaintiff is not entitled to recover. The oral testimony which the court below allowed to go to the jury showed that such representations were in fact made by Selby to the defendant, as well as to all the other Maryland policy-holders, before, or at the time their insurances were effected. But this testimony

was taken subject to exception, and the plaintiff by a special prayer asked the court to exclude it from the consideration of the jury, so that the real question presented, is, was such testimony admissible in face of the terms of the written contract between the parties evidenced by the defendant's premium note and application for insurance, or was the company bound by such representations, assuming them to have been made by their agent? The premium note, which was executed by the defendant on the 24th of February, 1880, is as follows: "(\$567). For value received in policy No. 513 (risk commencing the 1st day of March, 1880, issued by the Lycoming Fire Insurance Company), I promise to pay to said company or their treasurer for the time being, the sum of five hundred and sixty-seven dollars, in such portions and at such time or times as the directors of said company may agreeably to their act of incorporation require. The act of incorporation provides that all persons insuring with the corporation thereby become members thereof during the period they remain so insured, and every such member, before he receives his policy, shall deposit his promissory note for such sum as shall be determined by the directors, and a part, not exceeding ten per cent of such note shall be immediately paid, "and the remainder of said deposit note shall be payable in part or the whole at any time when the directors shall deem the same requisite for the payment of losses by fire, and such incidental expenses as shall be necessary for the transaction of the business of said corporation, and at the expiration of time of insurance, the said note or such part of the same as shall remain unpaid after deducting all losses and expenses during said term, shall be relinquished and given up to the maker thereof." And in the defendant's written application for membership and insurance of his property to the amount of \$8,385, bearing the same date as the premium note, and immediately above his signature, and so printed as to attract notice, is the following covenant or agreement: "And the undersigned, applicant for the proposed insurance, hereby covenants and agrees to accept the policy of the said Lycoming Fire Insurance Company, in accordance with and subject to its charter and by-laws. And it is expressly understood and agreed, that the said company will not be bound by any act or statement made to or by the agent, restricting its rights or varying its written or printed contract, unless inserted in this application in writing."

Now treating the representations made by Selby as amounting to a parol agreement between him, as the agent of the company, and

the defendant, it is manifest they are in direct conflict with the contemporaneous or subsequent written contract contained in and evidenced by the premium note, which must in a court of law be taken as expressing the final agreement of the parties, and as merging all previous verbal stipulations. An arrangement to the effect that the defendant should be assessed to the amount of five per cent of the note and no more during any one year, is utterly at variance with the promise and obligation to pay the whole or any part of it whenever the directors of the company should deem the same requisite for the payment of losses and expenses. The admission of such evidence so evidently infringes the salutary rule that the written contract must prevail over previous verbal arrangements, that it is scarcely necessary to refer to authorities upon the subject. The case, however, of *Thompson vs. Insurance Co.*, 104 U. S., 252, is directly in point. In that case the assured gave his note payable at nine months, for value received, in premium on his policy, "which policy is to be void in case this note is not paid at maturity, according to contract in said policy." The note was not paid at maturity, and in order to get rid of the forfeiture relied on by the defendant company, the plaintiff set up a parol agreement of the defendant made on receiving the note, that the policy should not become void on the non-payment of the note alone, at maturity, but was to become void at the instance and election of the defendant, which election had never been made. But the court held that as this supposed agreement was in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void, and said: "An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken."

But it is said the defendant was induced to enter into the contract by these representations thus made to him by this general agent, and that the company is therefore bound by them. The authority mainly relied on in support of this position is, *Lycoming F. I. Co. vs. Woodworth*, 83 Penn. St., 223, where this same company was the plaintiff, and where the suit was also for an assessment upon a

premium note. But in that case, the evidence was to the effect that when the defendant applied for his policy, he was told by the agent that the company was purely mutual, and issued no stock policies on a cash basis, that it did business only in Pennsylvania, and never took large risks in large cities, all of which statements were untrue at the time they were made. In other words, the representations upon which the defendant relied were false statements in regard to matters of fact—to a present or past state of things—and not, as in the present case, mere promises or assurances as to what the company would do in the future with respect to rights to be acquired under a contract not executed at the time they were given or made. This distinction is very clearly stated by the supreme court in *Insurance Co. vs. Mowry*, 96 U. S., 544. In that case, the policy declared that it was made and accepted upon the express condition that if the amount of any annual premium was not fully paid on the day and in the manner provided therein, the policy should be “null and void and wholly forfeited,” and it further declared that no agent of the company, except the president and secretary, could waive such forfeiture, or alter that or any other condition of the policy. In order to overcome the effect of a failure to pay a premium when it matured, the plaintiff sought to show that the agent who induced him to apply for the policy, told him the company would notify him in season to pay them, and that he need give himself no uneasiness on that subject, that no such notification was given before the maturity of the premium in question, and for that reason he did not pay it at the time required. But the court not only held that all previous verbal arrangements were merged in the written agreement, and that the entire engagement of the parties, must be conclusively presumed to be there stated, but also decided that the previous representations of the agent, could in no respect operate as an estoppel against the company. “The doctrine of estoppel,” say the court, “is applied with respect to representations of a party, to prevent their operating as a fraud upon one who has been led to rely upon them. They would have that effect, if a party, who by his statements as to matters of fact, or as to his intended abandonment of existing rights, had designedly induced another to change his conduct or alter his condition in reliance upon them, could be permitted to deny the truth of his statements, or enforce his rights against his declared intention of abandonment. But the doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person com-

plaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing."

But apart from these authorities, how is it possible for the defendant to avoid the agreement contained in his application, distinctly limiting and restraining the authority of the agent with whom he was dealing? That restriction is most explicit. It is an express stipulation that the company shall "not be bound by any act or statement made to or by the agent restricting its rights or varying its written or printed contract, unless inserted in this application in writing." It was so printed in the document that it must have been seen by the defendant when he signed it, unless he willfully closed his eyes, or was guilty of the most reckless inattention or negligence. By signing that application with that condition thus placed before him, and by accepting the policy issued thereon he must be estopped from setting up powers in the agent in opposition to such limitation or restriction, unless we are prepared to hold, as we are not, that insurance companies cannot restrict the authority of their agents, and that all conditions imposing limitations upon their powers, even though communicated to those to whom policies are issued, are utterly nugatory and useless. No doubt a liberal application should be made of the established rule that insurance companies doing business by agencies at a distance from their home office, are responsible for the acts of the agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals, which are not brought to their knowledge; but we take it that Mr. Wood, in his valuable work on Fire Insurance, has correctly stated the law which is not only sustained by the authorities, but sanctioned by reason and justice, where he says: "In all cases where the assured has notice of any limitation upon the agent's power, or where there is any thing about the transaction to put him on inquiry as to the actual authority of the agent, acts done by him in excess of his authority are not binding, as where it is generally known that limitations are imposed in certain respects. So where direct notice, or any notice which the assured as a prudent man is bound to regard, is brought home to the assured, limiting the powers of the agent, he relies upon any excess of such limited authority at his peril. That an insurance



company has the right to limit the powers of its agents must be conceded, and when it does impose such limitations upon his authority, in a way that no prudent man ought to be mistaken in reference thereto, it is not bound by an act done by its agent in contravention of such notice." Wood on Fire Insurance, sec. 387. In the case before us, there was no proof of any course of dealing which could have led the defendant to believe that the arrangement alleged to have been made by Selby, was subsequently approved or ratified by the company, so as to bring the case within the decision in Insurance Co. vs. Eggleston, 96 U. S., 572; nor does the instruction we are considering refer to or rely upon any direct act of the company empowering their agent to make this contract with and for the benefit of the Maryland policy-holders, and it would be most extraordinary if authority had been given to an agent to make an arrangement which would subvert the cardinal principle upon which mutual companies are founded, by allowing the responsibility for losses which should be shared equally by all, to be shifted from one set of members or policy-holders to another. For these reasons we hold there was error in granting this instruction as well as in rejecting the plaintiff's third prayer.

Third. There were two assessments sued for, one of  $12\frac{1}{2}$  per cent. made by the board of directors before the receiver was appointed, to cover losses up to the 28th of May, 1880, and the other of 20 per cent, made on the 12th of November, 1881, after the appointment of the receiver. By granting the defendant's eleventh prayer, the jury were instructed that if they find from the evidence that the receiver in making the assessment for 20 per cent, for the recovery of which this suit is in part brought, failed to assess the premium notes in force between the 28th of May and the 1st of July, 1880, for losses and incidental expenses occurring and accruing in the intermediate period, then the plaintiff is not entitled to recover. There is here an obvious error, in denying any recovery whatever, upon the ground alleged, for the fact that the last assessment was invalid, cannot affect the previous assessment made by the directors. The principal question, however, upon which the correctness or incorrectness of this instruction depends, is, can the defendant take advantage in this suit, of the alleged error in the last assessment, assuming it to exist? In determining this, we are not called upon to decide whether such an error or irregularity would invalidate an assessment, made by the directors of the company. In some of the

authorities cited by the appellee's counsel, it has been held that the action of directors in making such assessment, is not judicial in its nature, and therefore not conclusive upon the makers of the notes assessed, even though they are members of the corporation, and that it is incumbent upon the company in a suit for such an assessment, to aver and prove the losses upon which it was based, and that it was regularly and duly made in strict conformity with the provisions of their charter: *Herkimer County Mutual Ins. Co. vs. Fuller*, 14 Barb., 373; *American Ins. Co. vs. Schmidt*, 19 Iowa, 502; *Planters' Ins. Co. vs. Comfort*, 50 Miss., 662; *Pacific Mutual Ins. Co. vs. Guse*, 49 Mo., 329. On the other hand, the Supreme Court of Pennsylvania, in a case where a similar question arose under the charter of this same company, held that the assured as a member of the corporation submits himself to the acts of the directors as the common representatives of all the members, and is bound by the assessment made by them unless he can show fraud or gross mistake; that this is a rule he has no right to complain of because he became a member on the very condition of submitting to be thus assessed for losses; and that the presumption is, that the directors representing all the members made the assessment properly: *Hummel & Co.'s Appeal*, 78 Penn., 320.

But the assessment in controversy was not made by the directors, nor by the receiver acting either on his own motion, or under a general order of the court directing him to make an assessment sufficient to pay losses. On the contrary, the record shows that after his appointment by the court, on the 8th of October, 1881, the receiver in discharge of his duties, made out several statements or schedules, showing, 1st, the total indebtedness of the company; 2d, all the premium notes held by it, and the amounts expiring during each and every month since the date of the last assessment made by the company on the 14th of May, 1880; 3d, the amount of losses and expenses for each month from that date to the appointment of the receiver; and 4th, a statement of the percentage of assessment each class of notes expiring as aforesaid, was liable for, and the aggregate amount to be collected thereon. He then filed a petition to the court presenting these statements, and praying for a decree directing him to levy such an assessment upon the makers of the notes liable to assessment, as will be necessary to pay the debts of the corporation, and the costs and expenses attendant upon winding up its affairs. Afterwards the court, on the 12th of November, 1881, passed its decree in the premises. This decree recites that the court, after

full examination of the petition, schedules, papers, and other evidence submitted, and upon due consideration after hearing had, finds the facts set forth in the petition and schedules to be true, and then proceeds not simply to order the receiver to make the necessary levy and assessment, but specifies in detail the exact percentage he shall levy upon each class of notes expiring during each month from July, 1880, to September, 1881, inclusive, and then the specific amount of 20 per cent on all notes in force on the 8th of October, 1881, the date of the appointment of the receiver. In thus prescribing the precise percentage of assessment, as well as in other respects, this decree differs materially from the order which was passed in the case of *Thomas vs. Whallon*, 31 Barb., 172. We are unable to regard it in any other light than as an adjudication by a court of competent authority determining conclusively not only the amount of losses and expenses upon which the assessment was founded, but what notes should be assessed, and the exact percentage to which each class of them should be subjected. That the policy-holders, or members of the corporation, are bound by this adjudication, in suits like the present, we entertain no doubt. We cannot distinguish it in principle from what we decided in the recent case of *Glenn, Trustee, vs. Williams*, 60 Md., 93. In that case suit was brought by the trustee against a Maryland stockholder to recover an assessment on his unpaid subscription to the stock of a corporation, chartered by the laws of Virginia, which provided that two dollars per share shall be paid at the time of subscribing, and the residue as required by the president and directors. The company became embarrassed by debts, and a creditors' bill was filed in the Chancery Court in Richmond, where its principal office was located, against the corporation and certain of its officers, praying that an assessment on the capital stock be made and the debts of the corporation be ascertained and paid. In that proceeding an account was taken of the debts due by the corporation and they were adjudged to be paid, and an assessment for that purpose of 30 per cent on the unpaid subscriptions to the stock was made by the court, and the trustee was directed to collect the same by suit or otherwise. Among the defenses taken to the suit thus brought against him by the trustee, the defendant contended that the Virginia decree in determining and making the assessment was without validity or effect as against the stockholders, because they were not parties to the proceeding in their individual capacities, and had no opportunity to defend against the establishment by the decree of the large amount of debts against the corpor-

ation. But the court, after a careful consideration of the question, and a review of the authorities, determined that in contemplation of law the stockholders were before the court in all the proceedings touching the corporation of which they were members, and that the decree was conclusive and binding upon them in all the particulars complained of. So, and for the same reason, the decree in the case now before us, must have the same effect. The supposed error or irregularity in making the assessment cannot be availed of by the defendant, a member of the corporation, in this suit. We are, therefore, of opinion there was error in granting this eleventh prayer.

This disposes of all the questions directly presented by the appeal, but the defendant insists that at the time his note was given, the company had not complied with the conditions prescribed by our statutes for doing business in this State, and the note is for that reason void. This point was decided by the court below in favor of the plaintiff, and hence is not strictly before us on this appeal, but it has been fully argued and it goes directly to the root of the action. Besides, it will necessarily arise if another trial is granted, and if the objection be well taken it would be useless to order a new trial, even though there may be error in other rulings of the court. It is, therefore, in every way proper that this question also should now be disposed of. It appears from the testimony in the record as we understand it, that this company which had previously conducted its business in this State, sent to our insurance commissioner, in the usual course, their statement for the year 1879, in order to continue business for the year 1880. This statement was sent as required, within sixty days from the 1st of January, 1880. It was examined and laid aside for consultation. A demand was then made that the company should submit to a personal examination of its affairs, and to suit the convenience of the commissioner, the examination was not to be made until May, 1880. The statement was accepted by the commissioner upon that condition, and he issued his certificate under that condition. This certificate, though it bore date on the 1st of January, 1880, was not in fact issued until the 23d of April following. No examination was ever made, because when the commissioner subsequently wrote to the company, fixing a date therefor, they notified him that an examination would be unnecessary, as they had withdrawn their agent from Maryland, and their license was then revoked. The certificate thus issued and dated the 1st of January, 1880, was to be operative until revoked, that is, the company were to go on and do business subject to the revocation.

Now in all this we find no violation of any of the requirements of our insurance act of 1878, ch. 106. It is certain there had been no revocation of the company's license or permission to do business in this State up to the 24th of February, 1880, when the defendant effected his insurance, and gave his premium note, and clearly no subsequent revocation of that license could have the effect of rendering a contract, which was then valid and subsisting, inoperative and void. We must, therefore, overrule this objection to the action, and sustain the rulings of the court below on this subject.

Judgment reversed, and new trial awarded.

SUPREME COURT OF PENNSYLVANIA.

*Error to the Court of Common Pleas of Northampton County.*

NASSAUER

vs.

SUSQUEHANNA MUT. FIRE INS. CO.\*

A provision in the policy requiring the insured to give notice of a subsequent incumbrance reducing his interest below the amount insured, under penalty of forfeiture, is not against public policy.

Where the agent employed by a mutual company filled up the answers to the application, this did not constitute him the agent of the insured, notwithstanding a provision in the by-laws made the soliciting agent the agent of the insured.

The insured is not bound by a by-law of which he was ignorant, before he became a member, and he does not become a member until actually insured.

Where the property was valued by the applicant for more than double the real value, it was not error to refuse the admission of evidence that the agent consented to the valuation, and fixed the insurance accordingly.

A. G. DEWALT, Esq., and MESSRS. EMMENS & WALTER, for Plaintiff in error.

HENRY W. SCOTT, Esq., for Defendant in Error.

PAXSON, J.

This was an action of covenant upon a policy of insurance. The plaintiff was insured in the defendant company upon his house and furniture, as follows: \$1,000 upon his house, and \$200 upon his furniture. The house was valued in the application at \$1,400, the furniture at \$400. On the night of August 7, 1877, while the plaintiff and his wife were absent from home, the house and all its contents were destroyed by fire.

Upon the trial below the learned judge gave the jury a binding instruction to find for the defendant. If for any reason this instruc-

\* Decision rendered, April 13, 1886.

tion was proper we would not reverse, even though some technical errors appeared upon the trial.

It was claimed by the defendant that there was a gross overvaluation of the property insured, and that incumbrances had been placed upon the property after the date of the policy and before the fire, which reduced the real interest of the insured to an amount less than the sum insured, and that these were both breaches of the warranty contained in the policy.

The application contained this provision: "And it is expressly understood and agreed that this application and survey shall be a warranty on the part of the assured and constitute a part of the contract, and that the said company will not be bound by any act or statement made to or by the agent restricting its rights or varying its written or printed contracts, unless inserted in this application in writing."

The thirteenth interrogatory in the application was as follows: "If any judgments, liens, or mortgages, state particularly the amount and whether there is any insurance by mortgagee." To which the assured made answer: "I have \$500 claim on one acre of ground against, but not on building."

The thirteenth "condition of insurance" provided, *inter alia*, "And should there during the life of this policy, an incumbrance fall or be executed upon the property insured sufficient to reduce the real interest of the insured in the same to a sum only equal to or below the amount insured, and he neglect or fail to obtain the consent of the company thereto, then and in that case the policy shall be void."

This provision is based upon the theory, to state it mildly, that the owner of a house, incumbered to a part or the whole of its value, has not the same motive to preserve his property from fire as he would have in case it were free from incumbrance. There is nothing in the provision itself that offends public policy or good morals.

To meet the allegation of overvaluation plaintiff alleged that he was an ignorant German, and did not understand the English language. He also offered to prove (see 6th assignment), "that at the time of the application for insurance, Frank Laubach, the agent of the insurance company, made all the answers in his own handwriting to the questions in the application, and stated to the witness that on the payment of his premium he would get \$1,200 if a fire occurred by which his property was totally destroyed, and that Frank Laubach valued the property at \$1,400 for the building and \$400 for the household and kitchen furniture, making in all \$1,800. That

Frank Laubach fixed the amount of insurance which the company would take at \$1,200, and based the premium thereupon."

This offer of evidence was rejected by the court.

We do not assent to the proposition that the offer was incompetent because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and having obtained his consent proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company. So much was said in *Columbia Insurance Company vs. Cooper*, 14 Wright, 331. It is true that Section 15 of the by-laws of the company provides that, "In all cases shall the person forwarding applications be deemed the agent of the applicant, and not of the company, in any preliminaries to such contract or proposal." The policy provides that "this policy is made and accepted in reference to the by-laws of this company," and from this it was argued that by the terms of the contract of insurance the agent of the company becomes the agent of the assured. This court, in the case above cited, characterized a somewhat similar provision as a "cunning condition." The court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound to suppose that the company would falsely assert either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence a by-law of the company, of which he had no knowledge, and by which he was not bound, could not affect him in matters occurring before the granting of the policy: *Columbia Insurance Co. vs. Cooper*, supra. And



even a by-law of a mutual company which declares that black is white, does not necessarily make it so.

But the difficulty here lies deeper. It was competent under the authorities, to show that Laubach, the agent, had deceived the assured when he came to fill up the application, either by a misrepresentation of facts, or by setting down false answers in place of those that had been given. But the offer does not go to this extent. It shows no fraud practiced upon the assured; on the contrary, if the agent practiced a fraud, it was a fraud upon the company, by inducing them to issue a policy upon a property largely in excess of its value for the sake of the commissions.

This brings us to the question of what was the real value of the property. I give what are the undisputed facts. The building insured was 18 by 22 feet, two and a half stories high. It was of frame, built of hemlock, painted only on the outside, and was without a cellar. Any one, who has the slightest knowledge of building, can see at once that \$1,400 was a grossly excessive valuation. But we will not deal in generalities; we will take the undisputed evidence. The plaintiff himself called as a witness the carpenter who erected the building, and he put the cost of it from \$550 to \$650, and it was built at a time when labor and building material were higher than at the date of the insurance. Thomas E. Osman, a witness for the defendant, said it was not worth more than \$550 when built; and that when it burned down he estimated its value at \$450. Thomas F. Bachman, called by the defendant, said he would have replaced the building after the fire for \$300. This was all the evidence upon the subject, so that it appears, from the plaintiff's own showing, that the building was at no time worth more than \$650, and as he was the person who paid for its construction he must have known this fact when he applied for the insurance. Granting that the assured was an ignorant German, who did not understand English, the evidence discloses the fact that he was returning his building at a valuation more than double the amount he had paid for it. There was no fraud practiced upon him, and under the circumstances it was not error to reject the offer.

The value of the property bears closely upon the question of the incumbrances. The learned judge charged the jury (see 11th assignment) that: "Now the undisputed evidence in this case is that after the date of the policy and before the fire a number of judgments were entered up against the insured which reduced the real value of the property insured below the amount of the insurance. It is not

even pretended here that the company were notified of these circumstances, and there is no explanation or excuse given for want of notice. The 13th condition of the policy is one of the vital conditions upon which the company agreed to be bound to pay the amount of the insurance. It has not been complied with, and therefore there can be no recovery in this action upon the part of the plaintiff."

The learned judge was slightly inaccurate in this statement. One of the judgments, to which he evidently referred, was the Yeager judgment for \$668.55, which was not entered until after the fire, and was for the same debt secured by a mortgage, which the assured refers to as a "claim for \$500" in his application. We throw this out of the case. In point of fact there were two claims entered against the property during the life of the policy, viz., a judgment of George Snyder for the sum of \$50, and a mechanics' lien of \$62.50. There are authorities in New York and elsewhere which hold that mechanics' liens are not incumbrances within the meaning of such claims in policies of insurance: *Green vs. Ins. Co.*, 82 N. Y., 517; *Baxley vs. Ins. Co.*, 80 id., 21; *Merritt vs. Ins. Co.*, 73 id., 452. The reason appears to be that such liens are entered without the act or consent of the assured. In view of the peculiar language of this policy, the application of those cases, if no other reason existed, may well be doubted. We leave that question, however, until a case arises in which it is essential. It is not so here. The single judgment of Snyder, small as the amount is, was sufficient to avoid the policy, for the reason that it reduced the real interest of the plaintiff below the amount insured. This is not very important in view of the admitted fact that the property was rated at more than double its value, and insured at almost double. The judgment still further reduced it by its amount. Under such circumstances we find no error in the instruction complained of.

There was an offer to prove that the assured informed the agent at the time the application was made that there were incumbrances on the property, and that the agent told him that would make no difference. This offer the court rejected. See eighth assignment.

In point of fact there were no incumbrances on the property at that time, except the one noted in the application. In the light of this the offer was properly rejected; it had no significance.

This view of the case renders a discussion of the remaining assignments unnecessary.

Judgment affirmed.

## SUPREME JUDICIAL COURT OF MASSACHUSETTS.

HINCKLEY

vs.

GERMANIA FIRE INS. CO.\*

The premises insured were duly licensed when the insurance was effected, under the Massachusetts standard form of policy, which provided that it should be void if articles subject to legal restriction should be kept in quantities or manner different from those allowed or prescribed by law.

*Held*, That the policy was only suspended during the temporary use of the premises after the expiration of the license and before its renewal, but was revived upon such renewal.

Contract upon a policy of insurance against fire. The policy declared on was in the Massachusetts standard form, prescribed by Pub. Stat., chap. 119, § 139. The property covered by the policy consisted of billiard tables, bowling alleys, and their furniture and fixtures. It appeared that the property described in the policy was owned by Warren R. Spurr and Edward W. Spurr, until February 28, 1882, when they agreed to sell the same to Herbert A. and Edwin R. Hinckley, at which time they received from Herbert A. Hinckley, a brother of the plaintiff, a written instrument, called a furniture lease of the property. The plaintiff ran the bowling alleys and pool tables for hire and had no license after May 1, 1883, when a previous license, running in the name of Herbert A. and Edwin R. Hinckley expired. The property was destroyed by fire August 6, 1883. At the conclusion of the plaintiff's evidence, the superior court ruled that the plaintiff was not entitled to recover and directed a verdict for the defendant, and reported the case for the consideration of the supreme judicial court.

J. M. & T. C. DAY, *for Plaintiff*.

M. & C. A. WILLIAMS, *for Defendant*.

\* Decision rendered, June 18, 1885.

ALLEN, J.

The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections which we have considered.

In the first place, the defendants suggest there is certainly great doubt whether the license under which the plaintiff was doing business on the day when the policy was dated and delivered was of any validity, since this license ran to both brothers, Edwin and Herbert, though Herbert had ceased to have any interest in the place before the license was dated and issued. No authority is cited or reason assigned for so strict a construction, and we are of opinion that a license, duly granted to two persons under Pub. Stat., chap. 102, § 111, to keep a billiard or pool table or a bowling alley, for hire, is available to each of them.

It is then urged that, after the license had expired, the plaintiff kept the insured property in violation of law from May 1, 1883, till the last week in June, 1883. The policy was dated March 15, 1883, and the license then existing expired May 1, 1883. The fire occurred on August 6, 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds, first, that the illegality and criminality of the plaintiff's act in respect of the injured property vitiates the policy by operation of law, independently of any express provisions contained in the policy; and secondly, that under a provision of the policy the right to recover was taken away. The authorities cited in support of the first proposition do not support it. *Kelly vs. Home Ins. Co.*, 97 Mass., 288; *Johnson vs. Union Marine Ins. Co.*, 127 id., 555; *Lawrence vs. National Ins. Co.*, id., 557; *Cunard vs. Hyde*, 2 Ellis, 1.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was found as a matter of fact that the plaintiff, at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have ex-

pected to get his license renewed, or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if un contemplated at the time of taking out of the policy, would not of itself and as a matter of law render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and un contemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension of the risk without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause of the policy, giving them a right to cancel it upon notice and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. 1 Phil. Ins., § 975. Accordingly temporary unseaworthiness, if the ship has become seaworthy again will not defeat the policy. *Id.*, § 730. So as to other stipulations as, *e. g.*, that of neutral character and conduct. *Ib.*, § 975; *Worthington vs. Bearse*, 12 Allen, 382. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And, as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence as the forfeiture of his policy in addition to the penalty of \$100, which the legislature have considered adequate as the maximum punishment for his offense against the public. Pub. Stat., chap. 102, § 111.

It is further contended by the defendants that, however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "The policy shall be void if the insured shall make any attempt to defraud the company, either before or after the loss, or,

if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law ; or, if camphene, benzine, naphtha, or other chemical oils or burning fluids, shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting." In this Commonwealth, under the statutes for the regulation of trade and providing for licenses and municipal regulations of policy, there are a great many articles, which in a certain sense may be said to be "subject to legal restriction," dogs, fish, nails, commercial fertilizers, hacks, and horses in cities, may be referred to as examples.

It may well be questioned, whether under the maxim *noscitur a sociis* the clause in the policy above quoted ought not to be limited in its application to other articles of a similar character to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void, because an unlicensed dog was kept upon the premises, and yet such a dog, being subject to legal restrictions, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But, irrespectively of this consideration, it is not the necessary meaning of the word "void" as used in policies of insurance that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy, which has once begun to run, but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phillips on Ins., § 975, it is said : "After it (*i. e.*, the policy) has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty upon the assured and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred." And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances of the express provisions of the policy, such application is excluded.

In accordance with this doctrine, a provision in a policy that it should be void and be surrendered to the directors of the company

to be canceled in case of alienation of the property by sale, or otherwise, was held to mean inoperative for the time being ; and the assured, upon acquiring title, after a sale of the property by him, was held entitled to recover. *Lane vs. Maine Ins. Co.*, 12 Me., 44. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent (*i. e.*, of the company) this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire : *Power vs. Ocean Ins. Co.*, 19 La., 28. The same rule of construction has been applied to provisions against other insurance : *Obermeyer vs. Globe Ins. Co.*, 43 Mo., 573 ; *New England F. & M. Ins. Co. vs. Schettler*, 38 Ill., 166 ; *Mitchell vs. Lycoming Ins. Co.*, 51 Pa. St., 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss : *Schmidt vs. Peoria Ins. Co.*, 41 Ill., 295 ; *Ins. Co. of North America vs. McDowell*, 50 id., 120, 129. Without at present going beyond what is called for by the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured without a license to come within the prohibition of the policy, in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

The only remaining objection urged by the defendants is that the statements of loss rendered to them by the plaintiff were insufficient in failing to state that the plaintiff had no legal title to the insured property, and that the Spurrs had an interest in it. But there is no finding as a matter of fact that the plaintiff was not the owner of the property, and upon report of the case, we cannot say, as a matter of law, that it appears that he was not such owner : *Bailey vs. Hervey*, 135 Mass., 172 ; *McCarthy vs. Henderson*, 138 id. Moreover, no attempt to defraud the defendants being found or charged, the provision of the policy that a statement shall be rendered, setting forth the interest of the insured therein, was sufficiently complied with. There was no provision calling for an exact statement of his title or interest in detail, and a general statement of ownership was sufficient : *Fowler vs. Springfield Ins. Co.*, 122 Mass., 191.

New trial granted.

## SUPREME COURT OF PENNSYLVANIA.

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*Error to the Court of Common Pleas of Bucks County.*

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THIEROFF

vs.

UNIVERSAL FIRE INS. CO.\* }

The sufficiency of proofs of loss by fire is to be determined by considering the information actually contained in them, together with the circumstances attending their presentation and the conduct of the officers of the company in relation to the case. If the testimony elicits any circumstances from which a waiver by the company of the strict proof mentioned in the policy may be inferred, the case should be left to the jury.

An honest mistake on the part of the policy-holder in omitting to mention the existence of a lien upon the insured property, when such omission causes no injury to the insurer, will not work a forfeiture of the policy.

HENRY LEAR, Esq., and MESSRS. A. & J. FACKENTHALL, for the Plaintiff in Error.

PAXSON, J.

This was an action of covenant upon a policy of insurance to recover for the loss of the insured property by fire. The insurance was upon a frame saw mill, \$1,582.03; on engine under saw mill, \$900; on grain, flour, and feed in grist mill, \$551.25; and on fixed and movable machinery in grist mill, \$1,688. The property was destroyed by fire on September 3d, 1881. There was a total loss on the saw mill; the engine was badly damaged, but the loss could not be considered total; there was a total loss on the stock of grain, with the exception of two bags of wheat, and the loss appears to

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\* Decision rendered, May 26, 1886. From *Legal Intelligencer*.



have been total on the machinery of the grist mill. There was an additional insurance on the grist mill in the Lahaska Insurance Company, which loss was promptly paid. The defendant company resisted payment upon the ground that the proofs of loss were insufficient and not furnished in proper time. The plaintiff contended that the proofs were sufficient, and that in any event the company had waived formal proofs. The court below instructed the jury that the proofs were inadequate, that there was no proof of a waiver, and instructed the jury to find for the defendant.

The policy required the proofs of loss to be furnished within thirty days. The written proofs were furnished about thirty days after the fire. The learned judge conceded there was a waiver as to time, and of such waiver there can be no question under the evidence. It is also equally clear that, as to the saw mill, no proofs of loss were necessary, as the loss was total; and the officers of the insurance company visited the premises, saw that it was totally destroyed, and desired the plaintiff to procure estimates for rebuilding. Upon this point the law is too well settled to need the citation of authority. To this extent at least the ruling of the court below was error.

As the learned judge did not allow the jury to pass upon the facts, we must take the plaintiff's testimony for verity. While the proofs of loss are certainly informal and not very full, we must write into them what occurred at the office of the company immediately after the fire. The plaintiff then gave them notice of his loss, which is not disputed. He did more, however. He gave the company a detailed statement of the loss so far as he could do so. The president and secretary were present. In reply to the inquiry as to what was burned, he answers: "I told him wheat, corn, choppings, bran, flour, bags, with several little notions. \* \* I gave them all pretty much as I knowed. I told them all I knowed that time. \* \* \* They took down what I told them was destroyed out of the mill. The secretary did the writing, I think. Mr. Cross (the president) said he would come up and see about it. \* \* \* I told them everything was destroyed; the saw mill, too." Mr. Cross came up on the Saturday following the fire, examined the premises, inquired of the plaintiff what it would cost to replace the saw mill, and, being told he did not know, suggested that they should ascertain; that he would come up again and bring a man, and the plaintiff should have a man there; on the day appointed the plaintiff was there with his builder, but Mr. Cross did not come. He came upon a subse-

quent day and brought a man with him, but he did not notify plaintiff, and they did not meet. Mr. Cross himself testified, in answer to the question, "Was any arrangements made about coming up again?" "I suggested to him, if we could not come to any understanding of what the loss was, that perhaps it would be well for us to arrange to have a builder to see what the building was worth, and also a machinist to give us some idea of what the loss on the engine was. He admitted at that time, or rather seemed to think, the engine was not a total loss."

All this, and much more, occurred after the plaintiff had given the company as full a statement of his loss as it was in his power, and the same had been reduced to writing and retained by the secretary. So far as the object of the proofs of loss is to furnish information as to the details, the company had it as fully as it was in the power of the plaintiff to furnish. In addition, the president was twice upon the premises, and saw the condition in which the property was left, saw the plaintiff, and we hear not a word to indicate an intention to refuse to pay. Just here the language of our brother Gordon, in *Pennsylvania Fire Insurance Co. vs. Dougherty*, 40 Leg. Int., 334, is appropriate: "The waiver of the proofs of loss required in a policy may be inferred by any act of the insurer evincing a recognition of liability, etc., and prima facie the insured is entitled to have his loss made good immediately upon its happening, and when that loss appears to be an honest one, we are not disposed to scan very strictly the evidence which tends to rebut a technical forfeiture of the right of payment."

That this was a perfectly honest loss does not admit of a doubt. The company were dealing with an ignorant man, evidently intensely ignorant of everything relating to insurance, whose risk they had solicited through their agent, and were bound to deal with him in entire good faith. Their manner of dealing with him was calculated to inspire confidence and throw him off his guard. Had they regarded the proofs of loss as insufficient it was their duty to inform him in what respect they were unsatisfactory.

The proofs of loss here are much fuller and more satisfactory than in *Beatty vs. Lycoming Insurance Co.*, 16 P. F. S., 9. In that case the proofs were a loss of household furniture \$367, groceries \$233, the same as in this policy. This court very properly held the proofs insufficient.

Much stress was laid upon the fact that there was an incumbrance upon the property which was not mentioned in the proofs of loss,

and it was claimed that, under the sixth section of article 7 of the policy, such an omission worked a forfeiture of the policy. Said section provides that "any fraud or attempt at fraud, or any misrepresentation in any statement touching the loss, or any false swearing on the part of the assured or his agent in any examination, or in the proofs of loss, or otherwise, shall cause a forfeiture." It was contended for the plaintiff that the omission referred to was the result of ignorance; that when he bought the mill property he borrowed a portion of the money to pay for it upon the credit of his farm and gave a judgment therefor, supposing it would be a lien only on the farm. So strong does he seem to have been impressed with this belief that, upon the trial below, he testified that the judgment was a lien on the farm and not on the mill. For the purposes of this case we must consider it an honest mistake. Does it avoid the policy? If it does I would be ashamed to sit here and say so. The section of the policy referred to evidently contemplates fraud or willful misrepresentation. There was no warranty against incumbrances; this was a mere slip or omission in making out the proofs of loss. The claim in the policy is not obscure, and it would be an imputation upon the honesty of the company to place any other construction upon it. We are not willing to suppose they intended it as a pitfall in which to entrap and entangle simple-minded countrymen, who had been so unfortunate as to suffer a loss under one of its policies.

A comparison of the proofs of loss with the policy shows that all requirements have been substantially complied with, excepting in the omission to note the incumbrance. This, as before observed, was an innocent mistake, and as it has not been shown, and doubtless cannot be, that the omission has in any manner prejudiced the company, we see no reason why the proofs of loss should not have been submitted to the jury. There are instances in which the proofs of loss in this case would not be sufficient, but the defendant company has specified the items which the proofs of loss must contain under their policy, and the plaintiff is not bound to furnish anything further.

Judgment reversed, and a venire facias de novo awarded.

## UNITED STATES CIRCUIT COURT.

EASTERN DISTRICT OF MISSOURI.

HARMAN  
vs.  
LEWIS ET AL.\*

Where a certificate of membership in a benevolent association insures the beneficiary's life, and provides that no assignment of the certificate "shall be valid, unless approved by the secretary," an assignment without such approval will be invalid.

Query.—Whether such a certificate or policy in a benevolent association, incorporated under the laws of Missouri, and which has for its object to give financial aid and benefit to the widows and heirs at law of deceased members, or to such uses and purposes as the member shall by last will appoint, is assignable.

The dispute in this case is as to the right to receive a fund paid into court by the Masonic Mutual Benefit Association, a benevolent association organized under the laws of the State of Missouri. This fund consists of insurance money due from said association, by the terms of a certificate of membership issued to T. L. Funkheuser, now deceased. M. D. Lewis, the administrator of the assured, claims as such. M. L. Funkheuser claims under an assignment. John P. Harman claims as guardian of Lillian Funkheuser, only child and heir of the deceased, who did not leave a widow. The certificate of membership, or policy, names the assured as his own beneficiary. It contains, among other provisions, the following:—

"This certificate is issued by the society and accepted by the holder and beneficiary therein, upon the following express conditions and agreements: (1)

\* Decision rendered, June 20, 1885. From *Federal Reporter*.

that the same is issued and accepted subject to the articles of association and by-laws of the society \* \* \* (4) No assignment of this certificate shall be valid unless approved by the secretary."

The following clause is printed upon the back of the certificate :—

"Upon the death of a member of the society, if the certificate has not been assigned or pledged, the benefit will be paid to the beneficiary named in the certificate, or if no person is designated therein as beneficiary, then to the widow; if there be no widow then to the children of the deceased member in equal parts, or if there be neither widow or children, then to his executor or administrator."

The by-laws of the society provide that no pledge or assignment of a policy or benefit shall be valid or binding unless approved by the society. They also provide that the object of the society is to give financial aid and benefit to the widows and orphans and heirs-at-law of deceased members, or to such uses or purposes as said deceased members shall by last will and testament appoint.

The assignment in question was never approved by the secretary. Said guardian claims that even if the assignment had been approved it would have been invalid, because contrary to the articles of association and the Missouri statutes concerning benevolent associations.

GEO. D. REYNOLDS, for Harman.

GEO. C. SMITH, for Lewis.

M. L. WILCOX, for M. L. Funkheuser.

TREAT, J. (orally.)

Fund paid into court is subject to the ruling of the court as to the respective rights of parties. It is not necessary to enter into an elaborate consideration, in the light of authorities, of the peculiar obligations resulting from certificates of membership in this corporation. Whether such a certificate was assignable admits of extreme doubt. But even if assignable under the terms of the certificate, said terms were never complied with. The result is that the fund in court, less costs, must be paid to John P. Harman, guardian of the child of deceased.

Decree will be entered accordingly.

## COURT OF APPEALS OF NEW YORK.

JAMES HUGHES, *Respondent*,

vs.

SUN MUTUAL INS. CO., *Appellant*.\*

A boat loaded with coal was sunk in a storm. The insurers of the boat united with the insurers of the cargo to raise it, after which it was taken to the port of destination and delivered by the former to the owner.

*Held*, That where as here, payment of freight was a condition of delivery, the cargo becomes bound to the boat until by some default on its part, or some event which puts an end to the voyage, it becomes impossible to fulfill the contract of affreightment. If it reaches the port of destination by any agency set in motion by the original carrier, the lien for freight remains.

*Held*, That the abandonment of the cargo to the insurer did not release the carrier's lien for freight, where there was no abandonment of the vessel.

MR. KETTEL, *for Appellant*.

MR. MCCARTHY, *for Respondent*.

DANFORTH, J.

The complaint states that in November, 1881, the plaintiff as a common carrier and owner of the boat *Arizona*, had upon it and in his possession, coal of the value of \$1,000, which he had carried from New York to New Haven on freight; that the defendant, a domestic corporation, by violence took it from the boat. The answer of defendant admits its corporate character, but denies the other allegations. It also set up new matter, but no question arises on the pleadings.

On the trial of the issues before a judge and jury, the character and ownership of the plaintiff was proved, and that the coal, in all 273 tons, including seventeen on deck, was shipped under a bill of lading by the D., L. & W. Railroad Company "for account of R. H.

\* Decision rendered, October, 1885.

Williams & Co.,” of New Haven, and to be delivered to them “or their assigns (dangers of the seas excepted), they paying freight at the rate of seventy cents per ton.” While on the voyage and near New Haven a heavy storm was encountered, and the captain having first tied “a big buoy to the end of the boat, and located her where she would be easily found,” left the boat, and it sunk. The boat and cargo were insured; the boat by the Buffalo Insurance Company, and in pursuance of the terms of the policies, the owner notified them of the “misfortune,” claiming a total loss. But the policy provided that the insured should “not have a right to abandon the vessel, except in the case of an absolute total loss,” and that “the acts of the insured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver or an acceptance of an abandonment, nor as affirming or denying any liability under this policy, but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party.” Under these provisions the insurers refused to receive the loss, and in reply to the owner’s notice, informed him that they intended to raise the boat. The defendant insured the cargo on account of the D., L. & W. Railroad Company, and they in consideration of the payment of its value “sold, abandoned, and set over” the coal and their interest in it to the defendants. Soon thereafter, negotiations between the two insurance companies and the Baxter Wrecking Company, resulted in a proposal by the latter in substance, to raise the boat and cargo of coal, “and deliver them alongside dock in New Haven, to be discharged for and in consideration of the sum of \$1,000 to be apportioned between the boat and cargo according to the laws and usages of general average in such cases.” This was agreed to. Under it the boat was raised, and with all its cargo on board save the seventeen tons deck load, taken to the wharf at New Haven. While there the plaintiff was notified by the Buffalo Insurance Company to go to New Haven and take charge of the boat. He notified the defendant of his claim for freight money, and forbade the removal of the cargo until it was satisfied. The president of the company replied “he was not obliged to pay it, and would take the coal in spite of him.” After this the coal was sold by defendant’s directions, the wrecking company’s charges satisfied, and the balance paid over to the defendant. At the close of the trial the court was asked to direct a verdict for the plaintiff, and being denied the plaintiff requested the trial judge to submit to the jury the question whether

or not the plaintiff neglected and declined to raise that cargo and complete the voyage, and also whether or not, he "abandoned the cargo and the boat." This also was refused, and on motion by defendant, the complaint was dismissed. The general term granted a new trial, we think properly. When as in this case, payment of freight is a condition of delivery, the cargo becomes bound to the boat from the time it is received on board, until by some default on its part, or some event which puts an end to the voyage, it becomes impossible to fulfill the contract of affreightment (Abbott on Shipping, 595), and if in fact it reached the port of destination so that delivery can be made, whether by the boat named or by another agency set in motion by the original carrier, or by one standing in his place, freight is earned, the lien continues and can be enforced. This follows from the rule entirely well settled, that as between the owner and insurer a total loss of freight arises only where the ship and cargo are wholly lost, but if, although the ship itself be wrecked and utterly lost, the master can reshipe and forward the goods by reasonable endeavor and reasonable cost, it is his duty to do so (*Hubbell vs. Insurance Co*, 74 N. Y., 246). Here, it is undisputed that all save the deck load did reach the place of destination and was there disposed of by the assignees of the cargo, to whom its shippers undertook to transfer it. Apparently then, the contract to carry was on the plaintiff's part fulfilled, and the contract to deliver would have been but for the interference of the defendant. If by preventing delivery to the consignees, it has prevented the boat earning full freight, that circumstance cannot be to its advantage. The defendant assumes that the shippers were the owners and had the right of control. If so, the abandonment of the cargo to its insurers can have no other effect than to put them in place of the owner, and make a delivery of the coal to them as valid for the purpose of earning freight as would have been a delivery to the owner, but neither they nor the original owner could take it against the will of the ship owner, until payment of freight.

The learned counsel for the appellant does not claim that on the part of the owner of the ship there was a consummated abandonment. He says the plaintiff "tried to abandon. Under a clause in his policy he could not do this if insurers refused to accept abandonment; they did refuse." Again he says, "the refusal of his insurers to accept his abandonment was notice that the insurers would attempt to raise the boat, and they told him so from the first." The terms of the policy already referred to, justify that



claim. How then, can it be said that there was an abandonment by him? An abandonment of the cargo by the shippers or owners could not affect the boat. An actual abandonment of the boat to its insurer would have presented a different question. The freight pending would go with it as incident to the ownership, and if finally earned, would belong to the abandonee. It would have not only the title to the boat, but the possession and the advantages resulting from a completion of a voyage. But there was no abandonment to the insurers. The appellant's claim is that the plaintiff abandoned the voyage and treated it as put an end to, without the possibility of renewal and without the intention of resuming it. If that is so, then the contract was indeed dissolved.

On the other side is the contention that the question was not one of law, but at most one of fact for the jury to answer upon the evidence. If that is so, then the exception to the refusal of the trial judge to submit it to them was well taken. It is to be observed that the boat was in tow from New York, aided neither by sails of its own or steam, but carried along by the motive power of another vessel; that when by stress of weather it was cast loose and submerged, the place was marked by a buoy to which before sinking it was attached. The object of this was that it might easily be found. No other consequences in fact or law resulted from the sinking of the boat through the water to the bottom, than would have attended its stranding. In either case, although disabled from completing her voyage, the owner might still earn the whole freight by making the necessary repairs or by sending the cargo to the place of its destination in another boat. Here the boat, as the event clearly showed, was in position to be reached, repaired, and sent on, no removal even of the coal being necessary. The voyage, therefore, was not lost, and under the stipulations of the policy the recovery of the boat must be considered as undertaken for the benefit and on account of its owner. The insurance on the boat was for the voyage. Neither boat nor cargo were in fact lost. The boat was insured for \$1,200. The owner was paid \$750, and of that about \$300 went to the Baxter Company. The loss was a partial loss only, and so treated. The boat at no time ceased to be the property of the plaintiff, and the expense of recovery was borne by him. The voyage was completed and the cargo delivered at its port of destination, not indeed to the consignee, for that was rendered impossible by the act of the defendant. Upon the point now before us the evidence of the plaintiff and the president of the defendant is important. The former testi-

fied that he at once after the accident informed the defendant of the attachment of the buoy and its purpose, and that the Buffalo Insurance Co. were going to raise the boat. He claimed his lien and forbade the removal of the cargo until freight was paid. The testimony of the president hardly raises a conflict. He remembers the interview with the plaintiff soon after the loss, and while unable to remember the exact language used says, "the effect of it and the conclusion I came to was that he did not mean to do anything to get the vessel up; I think I said to him that being insured in the Buffalo Company to the amount of \$1,200, I supposed he had abandoned it, and we would have to make our own arrangements; I can't remember the exact language, but that is the conclusion we came to, and he gave me to understand that." He testified, however, "Hughes did not tell me in so many words that he had abandoned the boat and would have nothing to do with it; he gave me the impression he was going to have nothing more to do with it," and admits he was forbidden to take the cargo from the boat. But if there was contradiction, the construction of the testimony was for the jury. Unless voluntarily relinquished by the plaintiff, the legal possession which he had of the cargo continued after as it was before the accident, and I am unable to find anything in the appellant's points which should relieve the defendant from answering for such damages as the plaintiff sustained by being deprived of it. The case should therefore have been given to the jury.

It does not follow that the recovery should include the full value of the cargo. It may extend no farther than the value of the plaintiff's special property, and this again be diminished by subjecting it to a share of the expense incurred for its recovery. Neither of these questions are before us. It is enough that we now concur with the court below in the decision that the plaintiff was improperly turned out of court.

The order appealed from should therefore be affirmed, and the plaintiff in pursuance of the stipulation have judgment absolute.

Rapallo, Andrews, and Miller, J.J., concur. Earl, J., reads dissenting opinion, and Ruger, Ch. J., and Finch, J., concur.

## ENGLISH CASE.

## FRAUDULENT OVERVALUATION.

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*English Court of Appeal.*

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NORTON

vs.

ROYAL FIRE AND LIFE INSURANCE CO.\*

Whether a claim intentionally exaggerated for the purpose of securing a fair adjustment is a fraudulent overvaluation is a question which must be fairly presented to the jury.

This case raised a question as to what is to be deemed legal fraud in the case of fire insurance, and whether an exaggerated claim made on the assumption that insurance companies never allow the full claims, but always cut them down, is in the legal sense fraud.

The plaintiff, a grocer, in Sunderland, in March, 1882, insured with the defendants his stock, furniture, etc., for £450. By the stipulations in the policy, on the happening of any loss, the assured was within fifteen days at the latest to deliver to the company as particular an account as might be reasonably practicable of the several articles damaged, with the estimated value of each of them, having regard to their several values at the time of the fire. It was further provided that if the claim shall be in any respect fraudulent, or if any false statutory declaration should be made in support thereof, all benefit under the policy should be stopped; also that on the happening of any loss the company, without being wrongdoers, should have power to enter and remain in possession of the premises for purposes connected with the insurance. In January, 1884, a fire happened, on which the company entered into possession and remained for some weeks. The plaintiff made a claim for £274, of

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\* Decision rendered, August 11, 1886.

which £196 was for stock, and he made a statutory declaration that a statement he had delivered as to the goods on the premises was true. The claim was resisted as excessive, and, after negotiations, the plaintiff reduced it to £187—i. e., £87 for goods, and £100 for damages for the company having remained an unreasonable time on the premises. The claim being still resisted, the plaintiff brought his action for £150 as due under the policy, and for £100 as damages, to which the defendant pleaded that he had sent in a fraudulent claim. The plaintiff replied denying that it had been fraudulent, though it had been, in fact, too large in amount, alleging that he had made it out from recollection, not intending to induce the company to pay the full amount, but believing that they would not pay the full amount of any claim made, and that he had made no statement willfully false. In the witness box the plaintiff admitted that the stock burnt was only worth from £80 to £100; but he said, "my friends told me that I should never get what I claimed, and so I put a little onto everything, and I thought the claim first sent in for the stock was right." The defendants also alleged that there was other evidence of fraud, and that all the articles were not on the premises. At the trial Mr. Justice Manisty directed the jury that if all the articles were there it was not a false claim merely because too high a value was placed on them. The learned judge said that what the plaintiff had done no doubt was morally wrong in putting forward a claim which he knew was exaggerated, but he left it to the jury whether it was fraudulent in the sense of an intention to deceive or defraud the company by getting out of them money he knew he had no right to, and that must depend upon all the circumstances. The jury found that it was not fraudulent, and gave a verdict for the plaintiff of £87 for the goods, and £100 for the damages. Lord Coleridge and Mr. Justice Cave refused to disturb the verdict except by reducing the damages to £50, and from their judgment the defendants now appealed, on the ground of misdirection, and that the verdict was against the weight of evidence. The case was argued on June 12, when judgment was reserved.

MR. LOCKWOOD, Q. C., and MR. M'CLYMONT, *for the Appellants.*  
MR. M'INTYRE, *for the Respondents.*

Lord Esher, in delivering the judgment of the court, said that the view that the plaintiff had made a statement which he knew to be false in order that the company might act upon it seemed hardly to

have been presented to the jury. After much consideration the court was of opinion that the verdict so obtained on that point was not satisfactory. His lordship understood from the Lord Chief Justice that he had considerable doubt in giving judgment for the plaintiff on that point. The verdict, as reduced in respect of the damages for the misconduct of the defendants' servants, must stand, and therefore the plaintiff would have the costs of the action, but there would be no costs on either side in respect of the claim under the policy. If the plaintiff was not satisfied with that, there should be a new trial as to that claim alone, the costs of the old and new trial as to that to abide the result of the new trial, the plaintiff to determine within fourteen days whether he would have a new trial.

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